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~~Indian~~ Appeals :

BEING

CASES

IN

ADVOCATE

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

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OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1908.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

BAJRANGI SINGH AND ANOTHER . . . . PLAINTIFFS; J. C.*

AND 1907

MANOKARNIKA BAKHSH SINGH . . . DEFENDANT. *Feb.* 8, 13, 14; *Oct.* 31.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Indian Evidence Act, 1872, *s.* 48—*Alienation by Hindu Widow—Subsequent Consent of nearest Reversioners—Quantum and Effect of Consent.*

Held, on the evidence that a custom amongst the Bhale Sultan Chhattris, who had settled in considerable numbers in the district of Sultanpur, in Oudh, forming a "considerable class of persons" within the meaning of Indian Evidence Act, 1872, s. 48, was proved, excluding daughters and their issue from succession to the separated estate of their father.

A Hindu widow from 1872 to 1875, without legal necessity and without the consent of the reversionary heirs, executed deeds of sale of successive portions of her husband's estate to her son-in-law. Thereafter in 1877 and 1878 deeds of relinquishment for valuable consideration, ratifying the said sale deeds and agreeing not to dispute their validity, were executed by all the nearest reversionary heirs, being the only living reversioners in the line of the common ancestor of themselves and the deceased owner of the estate:—

Held, that the consent of these persons was sufficient and binding

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* *Present*: LORD MACNAGHTEN, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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on their descendants, and that it was immaterial that it was given after the execution of the said sale deeds.

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry*, (1869) 13 Moo. Ind. Ap. 209, followed.

APPEAL from a decree of the Court of the Judicial Commissioner of Oudh (March 6, 1900), affirming a decree of the District Judge of Rae Bareli (January 23, 1899).

The appellants sued as next heirs to recover possession of the estate of Sitla Bakhsh Singh, who died prior to the annexation of Oudh, leaving him surviving a widow, Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. The widow succeeded to possession of the estate, and died on August 6, 1892; and the main question raised in this appeal was whether the appellants on her death became entitled to the immediate possession of the estate to the exclusion of the daughters and their issue. The respondent is the son of the said Jagrani Kunwar, who married one Maheshar Bakhsh Singh.

Daryao Kunwar had during her lifetime executed several conveyances of portions of the estate. On October 21, 1872, she sold the village of Surpur to Maheshar Bakhsh for Rs. 1,000. On the same date she sold the villages of Misirpur and Mansahpur to the same person for Rs. 900 and Rs. 1,000 respectively. On July 24, 1875, she sold the remaining portion of the estate to Maheshar Bakhsh for Rs. 9,000. In pursuance of these sale deeds the purchaser was placed in possession and his name duly recorded in the revenue registers.

In 1873 Matadin, the father of the appellants, sued Daryao Kunwar to obtain a declaration that the said sale deeds dated October 21, 1872, should be cancelled and set aside. That suit was dismissed by the Court of the Judicial Commissioner on May 6, 1874.

A similar suit by Janga Kunwar, one of the daughters of Sitla Bakhsh, was also dismissed on August 25, 1876.

Subsequently, on May 4, 1877, some of the contingent reversioners to the estate, including Baijnath, the father of Mahpal Singh, one of the plaintiffs since deceased, executed a deed by which they ratified and confirmed the said deeds of sale executed by Daryao Kunwar, and on January 29, 1878, a similar deed was

executed by Janga Kunwar and Matadin Singh, the father of the appellants Bajrangi and Jagdamba.

After the death of Daryao Kunwar in 1892, and of Mahesha. Bakhsh in 1893, the name of Maheshar's son, the respondent, was entered in the revenue records and he was placed in possession of the estate in dispute. In 1894 the predecessors of the appellants sued, alleging that the said sale deeds were not executed under circumstances which would bind the reversioners, and claiming certain movable property as well as the said villages. It was further contended that daughters and their issue were excluded from succession by the custom of the tribe.

The respondent denied the title of the appellants, and alleged that the succession was governed by the ordinary Hindu law, and not by custom. He pleaded that Daryao Kunwar had an absolute title to all the property in suit except one house, and had bequeathed the movable property to him by her will dated November 18, 1887. He also contended that the said sale deeds bound the plaintiffs, not only because of the circumstances under which they were executed, but also in consequence of their confirmation by the deeds executed by Baijnath and Matadin in 1877 and 1878.

The District Judge decided (*a*) that the plaintiffs were not the nearest heirs ; (*b*) that the custom was not proved ; (*c*) that the sale deeds were not binding as having been executed under legal necessity ; (*d*) that the suit was not barred by limitation. On these findings he dismissed the suit.

The appellate Court decided (*a*) that the plaintiffs were on the pedigree the nearest male heirs of Sitla Bakhsh Singh ; (*b*) that the custom excluding daughters and their issue was sufficiently proved; and (*c*) that the conveyances executed by Daryao Kunwar in favour of Maheshar Bakhsh Singh, having been ratified and confirmed by Baijnath and Matadin, were binding on the plaintiffs. He accordingly affirmed the decree of the District Judge.

The main issue in the appeal was as to the validity and effect of the sale deeds taken in connection with the subsequent deeds of agreement. Upon this issue the District Judge expressed himself as follows :—

"The correct view of the law appears (from I. L. R. 10 Calc-

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1102) to be that the widow can relinquish her estate in favour of the next reversioner ; that the latter can thereupon transfer the property to any one he pleases, and therefore the widow, with the consent of the nearest reversioner, can alienate the property. It is a very different proposition to say that the widow can alienate and subsequently get the alienation ratified by the heirs of her husband. I do not think that the Calcutta Full Bench ruling referred to justifies such a conclusion. The principles of estoppel would, I consider, apply to the former state of things, and not to the latter. The consent of the heirs of her husband might lead a widow to make an alienation which, but for that consent, she would never have made. In such a case the widow's position would be altered by the consent of the heirs. This leads me to the argument put forward by Mr. Lincoln for the plaintiffs, that acquiescence to be binding must amount to an estoppel. It is clear that the agreements in question would not act as estoppels, as the widow was in no way induced to alter her position. On the contrary, they confirmed her in the position which she had taken up five or six years earlier. Nor can the agreements be binding as contracts, for there was no consideration. They are in my opinion only promises to abstain from disputing the alienations made by Musammat Daryao Kunwar, and amount to admissions, and, therefore, are conclusive. On these grounds I find that the suit is not barred by the agreements in question having been executed by Matadin and Baijnath."

The Court of the Judicial Commissioner upon this issue referred to *Rajkristo Roy* v. *Kishen Mohun* (1); *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2) ; *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (3) ; *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (4); *Ram Chunder Poddar* v. *Hari Das Sen* (5); *Gopeenath Mookerjee* v. *Kally Doss Mullick* (6) ; *Ramphal Rai* v. *Tula Kuari* (7); *Behari Lal* v. *Madho Lal Ahir Gyawal* (8) ; and concluded : " On a consideraiion of the cases cited it appears to

(1) (1865) 3 S. W. R. 14.
(2) (1861) 8 Moo. Ind. Ap. 529, 551.
(3) 13 Moo. Ind. Ap. 209, 228.
(4) (1884) I. L. R. 10 Calc. 1102.
(5) (1882) I. L. R. 9 Calc. 463.
(6) (1883) I. L. R. 10 Calc. 225.
(7) (1883) I. L. R. 6 Allah. 116.
(8) (1891) I. L. R. 19 Ind. Ap. 30.

me that a conveyance by a widow made with the consent of all the heirs of her husband living at the time, will conclude a person not living at the time who may be the heir of the husband at the time of the widow's death. In this view, if the transfers by Daryao Kunwar in favour of Maheshar Bakhsh Singh had been executed by Sheo Bakhsh Singh, Sheonarain Singh, Sheodayal Singh, Baijnath Singh, Hanuman Singh, and Matadin Singh, or those persons had at that time in any other manner signified their consent to such transfers, such transfers would be valid as against the appellants, even if there were no legal necessity for them. Those persons did not at the time of the transfers signify their consent to them. They did so subsequently by the 'deeds of agreement,' dated respectively May 4, 1877, and January 29, 1878. The question then arises as to what the legal effect of the transfers, taken with the deeds of agreement, is.

"It was not disputed that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed, it was said that they were paid to execute the deeds. It was argued that they had mere contingent reversionary interests in expectancy, and such interests could not be released or relinquished. It seems to me that the argument does not touch the point, which is, whether the effect of the transfers, taken with the deeds of agreement, is the same as if the executants of those deeds had joined Daryao Kunwar in transferring the property, or had at the time of the transfers consented to them. I am unable to see any distinction between the two cases. It seems to me that the transfers, when ratified by the reversionary heirs for consideration, have the same effect as if the reversionary heirs had joined in making the transfers, or had consented to them at the time they were made. I am of opinion, therefore, that the transfers having been ratified for consideration by the reversionary heirs, are valid as against the appellants and Mahpal Singh, who were not reversionary heirs at the time the deeds of agreement were executed, even if there were no legal necessity for them. Further, I think that the questions as to whether Daryao Kunwar understood the nature of the transfers, or as to whether the transfers were

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colourable, do not arise. If they do, the appellants were bound to give some proof that the transfers would not be binding on Daryao Kunwar, or that they were colourable, and they have given none.

"Although, therefore, I think that at the time when Daryao Kunwar died the appellants were the heirs of her husband, that Daryao Kunwar was in possession of the property in dispute as a Hindu widow, and that the appellants have proved that by custom the property of a Bhale Sultan Chhattri devolves upon his collateral male kindred, notwithstanding his daughter or her sons may be living, yet, as I think that the sales of the property in suit by Daryao Kunwar to the defendant's father are valid as against the appellants, I am of opinion that the appeal fails."

Ross, for the appellants, contended that inasmuch as it was proved that they were the nearest reversionary heirs of Sitla Bakhsh, and that the sales in question effected by Daryao Kunwar were not made under legal necessity, or with a view to the spiritual welfare of the deceased, those sales did not operate to bind the interests of the appellants in the property sold. The appellants sued as the nearest reversionary heirs of Sitla Bakhsh in existence at the time the succession opened. They are not barred by any disclaimer of reversionary rights made by their ancestors. The reversionary interest is a contingent one. There is no actual vested interest until the widow dies, and a sale of contingent rights, where the contingency never happens, the widow surviving the contingent reversioner, has no effect upon the proprietary right, and does not bind the actual reversioner who, on the death of the widow, succeeds by inheritance to her husband's estate. His title is direct from the deceased owner, and is not derived from preceding reversioners who never had title of any kind to transmit, the contingency on which their title would accrue never having happened. The respondent relies on certain reversioners having ratified the widow's sales for consideration. This ratification, it was contended, bound only the contingent reversioners who signed, but not the actual reversioner who were no parties to the transaction, but

succeeded by a title independent of that claimed by those who signed. Reference was made to *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah.* (1) In the cases cited in the judgment appealed from, the widow aliened after obtaining the reversioner's consent. Here a subsequent ratification is relied upon, and that by reversioners other than the plaintiffs. Reference was made to *Bahadur Singh* v. *Mohar Singh* (2); Mayne's Hindu Law, 7th ed., p. 855, and 6th ed. pp. 637, 638; *Bhagwanta* v. *Sukhi.* (3) On the question whether a custom to exclude daughters from inheritance was established by the evidence, reference was made to *Lekraj Kuar* v. *Mahpal Singh* (4); *Uman Parshad* v. *Gandharp Singh* (5); *Musst. Lali* v. *Murli Dhar* (6), which relate to the probative value of wajib-ul-arzes.

De Gruyther, for the respondent, contended that the appellants were bound by the deeds of sale in question. The consent of the reversioners was obtained. It made no difference that it was after and not at the time of the transactions of sale. The effect of that consent, being of all those who were likely to be interested in disputing the transaction, was to validate the widow's alienation as having been fairly made under such circumstances as would justify it by Hindu law. It placed the widow in the same position as if actual necessity had been proved. The consent operated to remove the usual restrictions on her power of alienation. Besides being a proof of good faith, the effect of such consent must be considered in reference to the established principle that a Hindu widow can surrender her estate to the next contingent reversioner, and thereby vest in him an absolute title to her deceased husband's estate. His consent to her alienation to a third party has a like effect, and operates to validate it even in the absence of legal necessity. Reference was made to *Jadomoney Dabee* v. *Saroda Prosono Mookerjee* (7); *Dibeah* v. *Korad Lala* (8); *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (9); *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (10)

(1) 8 Moo. Ind. Ap. 529.
(2) (1901) L. R. 29 Ind. Ap. 1, 8.
(3) (1899) I. L. R. 22 Allah. 33.
(4) (1879) L. R. 7 Ind. Ap. 63.
(5) (1887) L. R. 14 Ind. Ap. 127
(6) (1906) L. R. 33 Ind. Ap. 97.
(7) (1856) 1 Boulnois, 120.
(8) (1847) 4 Moo. Ind. Ap. 292.
(9) 8 Moo. Ind. Ap. 529, 550.
(10) 13 Moo. Ind. Ap. 209, 228.

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Nobokishore Sarma Roy v. *Hari Nath Sarma Roy* (1); *Behari Lal* v. *Madho Lal Ahir Gyawal.* (2). He also contended that the appellants were not proved to be the nearest reversionary heirs of Sitla Bakhsh, and that the tribal custom excluding the daughters was not proved, and in consequence the daughters were the next heirs to Sitla Bakhsh, and not the appellants.

Ross replied, citing Indian Evidence Act, s. 32, sub-s. 4, and s. 48, and *Behari Lal* v. *Madho Lal Ahir Gyawal.* (2)

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The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. Sitla Bakhsh Singh, a Hindu of the tribe of Bhale Sultan Chhattris, resident in Sultanpur, died some time before the annexation of Oudh, leaving him surviving a widow named Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. He was absolute owner of an estate known as Pindara Karnai and other property, which at his death passed to his widow, and, at her death, would have passed to his daughters, but for a custom of the tribe excluding daughters and their issue from succession. The widow died on August 6, 1892, having previously sold the whole of the estate to her son-in-law Maheshar Bakhsh Singh, the husband of her daughter Jagrani Kunwar, and mutation of names in the Revenue Registers was effected in his favour. After the death of Maheshar, which occurred on April 3, 1893, the name of his son, Manokarnika Bakhsh Singh, the present respondent, was entered in the Government records as proprietor of the estate; and the present appellants (with one Mahpal Singh, who died while the case was pending) brought the suit now under appeal, claiming that, by reason of the custom of the Bhale Sultan Chhattris, they were the next heirs in the reversion of the estate of Sitla Bakhsh.

In the Courts below, and before their Lordships, two main questions were raised: First, whether the custom had been proved; and, secondly, whether certain deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the appellants, who were the

(1) I. L. R. 10 Calc. 1102. (2) L. R. 19 Ind. Ap. 30.

nearest reversioners at the time when the succession opened, at the widow's death. In the Courts in India, the District Judge held the custom not proved and the deeds not binding; the Judicial Commissioner came to the exactly opposite conclusion on both points. The conflict of opinion in the Courts in India upon the question of custom has made it necessary for their Lordships to examine carefully the evidence in this case, in order to ascertain whether the alleged custom has been satisfactorily proved. In making this examination, their Lordships have been materially assisted by the elaborate analysis of the evidence made by both the learned judges below, and by the learned counsel who argued the appeal. They will briefly state the grounds on which they consider the judgment of the Judicial Commissioner on this point must prevail.

The Bhale Sultan clan appear to have derived their name, some three centuries ago, from their warlike exploits in the service of the Emperors of Delhi. They are now settled in considerable numbers in the district of Sultanpur in Oudh, in several villages, in which they constitute the bulk of the population. In the language of the Indian Evidence Act, 1872, s. 48, they form a "considerable class of persons." The evidence in support of the custom was mainly oral, and no document was produced of an earlier date than the British annexation. Thirty-five witnesses were examined on behalf of the appellants. They were all members of the Bhale Sultan clan, mostly men of mature age and of good position. They all gave evidence that in their clan it was the custom that daughters and their issue were excluded from succession to the separated estate of their father, and put forward thirty-nine instances in which this exclusion had taken place. The Judicial Commissioner held that twenty of these instances had been satisfactorily proved. For the respondent no evidence was given in contradiction of these instances, though ample time was allowed for the production of such testimony had it been available; but six witnesses were called, one of whom had signed a wajib-ul-arz in which the custom was set up, and two gave evidence in support of the custom.

In corroboration of the oral evidence, a number of village

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administration papers (wajib-ul-arz) were produced, of which seven were admitted by both Courts to be relevant, as relating to Bhale Sultan villages. In all these the rule is stated that a daughter and her issue do not alal-umum (that is, as a general rule) obtain the share. One of them is attested by forty-four zemindars and lambardars of the village, another by forty-nine, others by eight or ten. The dates of these documents are not given, but they were all officially recorded prior to the institution of this suit, and quite independently of the parties thereto.

One other piece of evidence remains to be noticed. It has been stated that Sitla Bakhsh left two daughters, Janga Kunwar and Jagrani Kunwar. In 1876 Janga Kunwar filed a suit against her mother Daryao Kunwar and her brother-in-law Maheshar Bakhsh for a declaratory decree that she was entitled to succeed to half her father's estate; and in answer to her claim, the vakil for the defendants put forward the plea that "among Bhale Sultans a daughter never succeeded to the inheritance of her father." The Court came to no decision on the point, but disposed of the suit on another ground, reserving Janga Kunwar's right to put forward her claim on the death of her mother. The fact, however, that this defence was raised shews that the existence of the custom was present to the mind of Daryao Kunwar at the date of the transactions to which their Lordships will now proceed to refer.

Although Daryao Kunwar appears to have been willing to invoke the custom as a defence against the claim of her unmarried daughter, she was at the same time endeavouring to defeat the operation of the custom in regard to her married daughter, Jagrani Kunwar, and her husband, Maheshar Bakhsh Singh, the father of the present respondent. During the period from October 21, 1872, to July 24, 1875, she executed five deeds of sale, by which she purported to transfer, for valuable consideration, successive portions of her husband's property to Maheshar Singh. The District Judge has found that these deeds were executed without "legal necessity"; and it is certain that the preliminary consent of her husband's reversionary heirs was not obtained. One of these heirs, Matadin Singh, the father of the

appellants Jagdamba Singh and Bajrangi Singh brought a suit in the Court of the Deputy Commissioner of Sultanpur in 1873 to set aside three of the deeds; but on appeal this suit was dismissed on a technical ground by the Judicial Commissioner on May 6, 1874. Janga Kunwar's suit, already referred to, was dismissed on August 25, 1876. Having thus succeeded for the time being in the Courts, Daryao Kunwar entered into nagotiations with the persons who were at that time admittedly the nearest reversionary heirs to her husband's estate, and obtained from them two documents called deeds of relinquishment, one dated May 4, 1877, and the other dated January 29, 1878. The first of these was signed by five persons, four of whom died without issue in Daryao Kunwar's lifetime, and the fifth, Baijnath Singh, is the father of the plaintiff Mahpal Singh, who died while this suit was pending in the Court of the District Judge, and is now represented by the appellants. The second was signed by Janga Kunwar, Matadin Singh (the father of the present appellants), and Hanuman Singh, who is still living, but is not a party to this suit. In these documents, which are identical in terms, after enumerating the sales by Daryao Kunwar to Maheshar Singh, the executants go on to say: "We all have given our full consent to all those sale-deeds which the Thakurain has executed in favour of the Babu, and will ever remain so satisfied. And after the death of the Thakurain we shall bring no claim against the Babu on account of the moveable and immoveable property owned by her; hence we have executed this deed of agreement so that it may serve as an authority and be of use in time of need."

"It was not disputed," says the Judicial Commissioner in his judgment, "that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds." Upon these facts, the Judicial Commissioner found that the transfers to Maheshar Singh were valid and dismissed the appeal.

The restrictions imposed by the Hindu law upon the widow's power to alienate her deceased husband's estate have frequently been the subject of consideration by this Committee.

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"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely wordly purposes. To support an alienation for the last she must shew necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred" : *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah.* (1)

"The kindred in such case," their Lordships observe in a later case, "must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law" : *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry.* (2)

Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of *Ramphal Rai* v. *Tula Kuari* (3), considered that "The plain principle deducible from these relings of the Privy Council is that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu law, it must have the consent of all those among her kindred who can reasonably be regarded as having an interest in questioning the transaction."

And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive had no greater effect in her favour than it would have had if he had been a stranger. "We think," say the learned judges, "that the spirit of the Hindu law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt; and that no reversioner possesses such a present vested

(1) 8 Moo. Ind. Ap. 529, at p. 551. (2) 13 Moo. Ind. Ap. 209, at p. 228.
(3) I. L. R. 6 Allah. 116.

interest as enables him to combine with her in defeating his co-reversioners. In other words, her right and theirs have one common basis, that of survivorship to the widow, and it is incapable of anticipation."

The High Court of Calcutta has taken a different view, based upon a long current of authority in that Court, albeit two of the learned judges, Garth C.J. and Pigot J., considered that the principles on which the decision was founded were open to great objection. In the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1) a Full Bench held that, under the Hindu law current in Bengal, "A transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property."

The ground of the decision is thus shortly stated by Garth C.J.: "If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make."

And more fully by Mitter J.: "Whatever conflict there may be upon the question whether a Hindu widow may sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, there is no conflict in the decisions, since the case of *Jadomoney* (2) was decided in the late Supreme Court of Calcutta, upon the question whether the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid or not. Such relinquishment by the widow has been held for a long series of years to be valid. . . . But if the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as a logical consequence, that she can alienate it merely with his consent without any legal necessity."

In a subsequent case, *Radha Shyam Joy Ram Senapati* (3), the same High Court held that the consent must be of the whole body of persons constituting the next reversion.

(1) I. L. R. 10 Calc. 1102. (2) 1 Boulnois, 120.
(3) (1890) I. L. R. 17 Calc. 896.

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The Calcutta decision, of course, is not binding upon other High Courts, but it has been followed in Madras. In the case of *Marudamuthu Nadan* v. *Srinivasa Pillai* (1), decided by a Full Bench of the Madras High Court in 1898, Subramania Ayyar J. says: "I think it unnecessary to go into the question whether the Hindu law, according to the texts or the commentaries, lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which shew that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Court. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule, as stated by the Judicial Committee in *Behari Lal* v. *Madho Lal* (2), should, I think, be taken to be a rule applicable to this Presidency too, subject, no doubt, to the restriction pointed out by their Lordships, viz., that the surrender should be absolute and complete, and that the whole limited estate should be withdrawn, a restriction that would guard against the injurious results which would follow if the rule were not so qualified."

The question was also considered by the High Court of Bombay in 1901 in the case of *Vinayak* v. *Govind*. (3) In the course of his judgment Jenkins C.J. says (4): "There can be no question that, apart from legal necessity, a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy. The High Court of Calcutta on the whole appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating, by

(1) (1898) I. L. R. 21 Madr. 128.
(2) L. R. 19 Ind. Ap. 30.
(3) (1900) I. L. R. 25 Bomb. 129.
(4) *Ibid*. at p. 133.

the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some difficulty as to this doctrine. . . . . The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption under certain circumstances, and it finds support in the texts. . . . . This view has, too, in a measure, the sanction of the Privy Council." And he quotes the cases in 8 Moo. Ind. Ap. and 13 Moo. Ind. Ap. which have been already referred to. "Turning then to Bombay," he goes on to say, "the High Court here appears to have accepted this view rather than that which finds favour in Calcutta." In the same case Ranade J. observes (1): "The Bengal theory that the widow's interest was a life interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title, has never met with much acceptance on this side of India.. Our leading case—*Varjivan Rangji* v. *Ghelji Gokaldas* (2)—lays down that the consent must be of all the kindred, but that does not mean that every single member who is a kindred must actually join in the conveyance." And the conclusion to which he comes is that, in order to validate an alienation by a widow otherwise than from legal necessity, "The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one."

The principle being thus admitted by the High Courts in India, the question of the quantum of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the province of Oudh in which this restriction has been acted upon; and, though they would be unwilling to extend the widow's power of alienation

(1) I. L. R. 25 Bomb. 129, at p. 139. (2) (1881) I. L. R. 5. Bomb. 563.

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beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High Court of Calcutta—*Radha Shyam* v. *Joy Ram* (1)—that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

Applying this rule to the case now under consideration, the Judicial Commissioner has found that "of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers superior in degree to Hanuman Singh and Sheo Dayal Singh, or equal in degree to Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai." Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. Omnis ratihabitio retrotrahitur et mandato priori aequiparatur. The appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the decree of the Judicial Commissioner dated March 6, 1900, confirmed. The appellants must pay the costs of the appeal.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for respondent : *Watkins & Lempriere.*

(1) I. L. R. 17 Calc. 896.

MUSAMMAT SURAJMANI AND OTHERS . . DEFENDANTS;

AND

RABI NATH OJHA AND ANOTHER . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

J. C.*

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Oct. 29;
Dec. 5.

Deed of Gift—Construction—Words—"Malik wa khud ikhtiyar"—Malik imports full proprietary Rights.

Where a Hindu husband gave certain property by deed of gift or testamentary instrument to his first and second wives and daughter-in-law respectively, reserving to himself a life interest, but directing that after his death they shall be "malik wa khud ikhtiyar, i. e., owners with proprietary powers":—

Held, in a suit by the husband's reversionary heirs for a declaration after the death of the said second wife that she was incompetent to alienate the property so given, that she took an absolute estate. The word "malik" imports full proprietary rights, unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose.

APPEAL from a decree of the High Court (November 2, 1903), affirming a decree of the Subordinate Judge of Gorakhpur (March 11, 1901).

The question decided was whether, on the true construction of the deed of gift, the material portion of which is set out in their Lordships' judgment, Surajmani, the appellant, took the property in suit with power of alienation. She had on March 21, 1896, executed a will to the effect that her brother should become absolute owner thereof on her death. The Sub-ordinate Judge held that she took a Hindu widow's estate and was incompetent to alienate the same. The High Court ruled as follows :—

"We hold that under the Hindu law, as interpreted up to the present in the case of immovable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms. The learned vakil for the appellants contended that the words of the document we have to consider, and that we have cited above, did expressly convey such power, or at any rate that from them the intention of the executant to confer a power of alienation was

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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evident. We cannot so hold. We do not think that the words are any stronger than similar words to be found in the cases cited to us."

De Gruyther, for the appellants, contended that under the gift or devise to Surajmani of the property in suit she acquired a heritable and transferable interest therein. The word "malik" imports absolute ownership and full power of alienation, unless its meaning is cut down by the context. Reference was made to *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1); *Rajnarain Bhadury* v. *Ashutosh Chuckerbutty* (2); *Padam Lal* v. *Tek Singh* (3); Mayne's Hindu Law, 6th ed., p. 865, 7th ed., p. 890, s. 664; *Jeewun Purda* v. *Sona*. (4)

Ross, for the respondents, contended that "malik" meant owner with independent authority, but not necessarily absolute owner with unrestricted power of alienation, especially in the case of a Hindu widow being the donee. The appellant Surajmani, under the instrument in suit, did not take an absolute power of alienation in the absence of express words conferring that power. Reference was made to *Mathura Das* v. *Bhikan Mal* (5); *Janki* v. *Bhairom* (6); Stokes' Hindu Law, p. 241; Dayabhaga, c. 4, s. 1, vv. 1, 18, 19 and 23, p. 373; Mitakshara, c. 1, s. 1, v. 20, *Harilal Pranlal* v. *Bai Rewa* (7); *Mahomed Shumsool Hooda* v. *Shewukram*. (8) In the case cited for the appellants from 27 Calc., the Courts held that there was something more than mere ownership given, that is to say, ownership as exercised by the donor, whose powers of alienation were unrestricted, and that the gift of unrestricted power of alienation was by force of those additional words.

De Gruyther replied.

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Dec. 5.

The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal from the High Court at Allahabad, affirming the decision of the Subordinate Judge of

(1) (1897) L. R. 24 Ind. Ap. 76.
(2) (1899) I. L. R. 27 Calc. 44 and 649.
(3) (1906) I. L. R. 29 Allah. 217.
(4) (1869) 1 N. W. P. 66.
(5) (1896) I. L. R. 19 Allah. 16.
(6) (1896) I. L. R. 19 Allah. 133.
(7) (1895) I. L. R. 21 Bomb. 376.
(8) (1874) L. R. 2 Ind. Ap. 7.

Gorakhpur. The question is whether the first appellant, Musammat Surajmani, acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late husband, Ishwar Nath Ojha. The material part of the document is as follows : " I now of my own free will and accord while in a sound state of mind and in enjoyment of my senses make a gift of the entire village Dwarkapur Nankar in tappa Asnari and half of the village Telpurwa in tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of Mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and half of mauza Jamla Jot, i.e., an eight anna share in it, in tappa Barikpar to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration on the conditions that during my lifetime I shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated, "as owners with proprietary powers," are in the original " malik wa khud ikhtiyar." The appellants contend that these words are amply sufficient to confer an alienable estate. The respondents, on the other hand, contended, and the Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband, Musammat Surajmani entered into possession of the property given to her, and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the plaintiffs (respondents), as heirs of Ishwar Nath and of Surajmani, for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this appeal is brought. The

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effect of the word " malik " in testamentary gifts has been often discussed in cases decided in the different Courts in India, where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it, and expressed the opinion that the words in question passed the absolute estate : *Padam Lal* v. *Tek Singh.* (1)

In the present case the Subordinate Judge seemed to recognize that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer* v. *Luchmee Pershad* (2), decided in 1875. Mitter J., in dealing with the case of a will where the donees were the widow and daughter of the testator, and the word " malik " was used, thus expresses himself : " As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (maliks) proprietors and his entire estate shall devolve upon them. In *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (3) the Judicial Committee say : 'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu Law (as under the present state of the law it does by will in England) an estate of inheritance.' In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani Kooer and Uma Kooer. Therefore adopting the rule of construction above quoted we must hold that the gift in question was an absolute gift unless it can be shewn that by the Hindu law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widow's estate ' under the law of inheritance. I am not aware of any such provision in the Hindu law nor have we been referred to any authority in support of it."

(1) I. L. R. 29 Allah. 217, at pp. 221, 222.

) (187 24 W. R. 395, at p 396.

(3) (1872) L. R. Ind. Ap. Suppl. 47. 65.

The question as to the effect of the word " malik " came before this Board in 1897 in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*. (1) The donee in that case was a man, but the principles of interpretation laid down were of general application. Referring to the donee, the testator said : " If no children are born to me . . . . or if at the time of my death they are not alive, then . . . . my nephew . . . . becoming on my death my sthalabhishikta and becoming owner (malik) of all my estate and properties, &c., shall, remaining my sthalabhishikta, obtaining the management of the iswarshebas . . . . enjoy with son, grandson, and so on in succession the proceeds of my estate. . . . . The minor, on reaching majority, shall exercise ownership (malikatwa) over all the properties."

In delivering the judgment Lord Davey says : (2) " It was not disputed . . . . that the son of the testator, if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate. . . . . Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words ' become owner (malik) of all my estates and properties ' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words ' enjoy with son, grandson, and so on in succession,' which latter words are frequently used in Hindoo wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word " malik " as was taken in the Calcutta case in 24 W. R. above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances, or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last-mentioned case not to suffice. But, while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word " malik, " the context does seem to strengthen the presumption that the intention was that " malik "

(1) L. R. 24 Ind. Ap. 76. (2) Ibid. at p. 88.

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should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned counsel for the respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and, if this be admitted, the respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the appeal be allowed and decrees of both Courts below discharged, and instead thereof the suit dismissed with costs in both Courts. The respondents will pay to the appellants the costs of this appeal.

Solicitors for appellants : *Pyke, Parrott & Co.*
Solicitors for respondents : *Osborn, Jenkyn & Son.*

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SRIMATI BIBI PHUL KUMARI . . . . PLAINTIFF
AND
GHANSHYAM MISRA AND ANOTHER . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Court Fees Act (VII. of 1870), Sched. II., art. 17, sub-s. 1—Plaint filed under s. 283, C. C. P.—Court Fee—Construction.

A plaint filed under s. 283 of the Civil Procedure Code to establish, with consequential relief, a claim to attached property which has been rejected in execution proceedings, being to set aside a summary order of a civil Court not established by letters patent, is liable to be stamped Rs. 10 under the Court Fees Act (VII. of 1870), Sched. II., art. 17, sub-s. 1.

Dhondo Sakharam Kulkarni v. *Govind Babaji Kulkarni*, (1884) I. L. R. 9 Bomb. 20, approved.

APPEAL from a decree of the High Court (December 10, 1903), affirming a decree of the Subordinate Judge of Purneah (August 27, 1900).

* *Present* : LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON.

The sole question was as to stamp fee payable on the plaint in the suit, described in the judgment of their Lordships and filed under s. 283 of the Civil Procedure Code.

The Courts below held that the suit did not fall within art. 17 of Sched. II. of the Court Fees Act, but was one on which Court fees were payable, calculated on the amount of Ghanshyam's decree, in execution of which the property to which the plaint related had been seized. On failure to pay a further sum of Rs.1,230 into Court, making, with the Rs. 20 already paid, Rs. 1,250 in all, the Subordinate Judge dismissed the appellant's suit with costs.

De Gruyther, for the appellant, contended that those decisions were wrong, and that the fee demandable in this case was governed by the said art. 17. It was a suit to set aside a summary decision of a Civil Court not established by Royal Charter for which Rs. 10 was prescribed, and the appellant had paid double that amount. There was no authority for claiming a fee calculated on the amount or value of the decree in execution of which the appellant's property had been attached; nor was it the case of a suit for a declaratory decree with consequential relief. It was a suit authorized by special provisions of the Civil Procedure Code to set aside a summary order, and was virtually in the nature of an appeal from that order: see Act XIV. of 1882, ss. 278, 281, 283; Act VII. of 1870, ss. 6 and 7, sub-s. 5; Sched. I., which prescribed ad valorem fees; Sched. II., art. 17, which applied to this case. Reference was made to *Jalaluddeen Mahomed* v. *Shohorullah* (1); *Ahmed Mirza* v. *Thomas* (2); *Modhusudun Koer* v. *Rakhal Chunder Roy* (3); *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (4); *Gobind Nath Tiwari* v. *Gajraj Mati Taurayan*(5); *Gulzari Mal* v. *Jadaun Rai* (6); and as regards a suit for declaratory decree with consequential relief, see Specific Relief Act (I. of 1877), s. 42, and *Kathama Natchiar* v. *Dorasinga Tevar*. (7)

The respondents did not appear.

(1) (1874) 15 Beng. L. R. Ap. 1.
(2) 1886) I. L. R. 13 Calc. 162.
(3) (1887) I. L. R. 15 Calc. 104.
(4) I. L. R. 9 Bomb. 20.
(5) (1891) I. L. R. 13 Allah. 389.
(6) (1878) I. L. R. 2 Allah. 63.
(7) (1875) L. R. 2 Ind. Ap. 169.

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Nov. 19.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The sole question in this appeal is what is the proper Court fee payable on the plaint in the suit. The Act governing the question is the Court Fees Act (VII. of 1870). Proceeding on the theory that what was due was Rs. 20, the appellant stamped her plaint accordingly; her suit was dismissed in the Court of first instance on the ground that her plaint was insufficiently stamped; and this judgment was affirmed by the High Court of Bengal in the judgment now appealed against. The present appeal has been heard ex parte.

For the right determination of the question at issue it is necessary to acertain what are the object and the nature of the suit. Now, fortunately, this is not dubious. The plaintiff succinctly and accurately states that the cause of action accrued on April 24, 1899, that being the date of a judgment pronounced against her in the Court of the Subordinate Judge of Purneah in certain execution proceedings. What had taken her into that Court was this: she had bought a property from the second respondent, and had taken possession and was registered as proprietor. After and notwithstanding this, the first respondent purporting to be a creditor of the second respondent under a decree for Rs. 62,022, attached the property and advertised it for sale. The appellant lodged with the Subordinate Judge of Purneah, before whom the execution proceedings took place, a claim to the property claiming that her right should be declared and that an injunction should issue against the execution of the decree held by the first respondent. This claim was rejected by the Subordinate Judge on April 24, 1899, and his decree is the cause of action in the suit which gives rise to this appeal.

Now the right of the appellant to sue for the establishment of her right, which the Subordinate Judge had negatived, rests on s. 283 of the Civil Procedure Code (XIV. of 1882): "The party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, the order shall be conclusive."

This is clear of itself, and the High Court, in the judgment

appealed against, describes the suit as "of the nature referred to in section 283."

Having thus ascertained what is the nature of the suit, their Lordships turn to the Court Fees Act to see whether such actions of appeal are specifically dealt with; for it is only if they are not specifically dealt with that the task arises of finding to which group of cases this is to be assigned. Now, art. 17 of Sched. II. is expressly made to apply to "Plaint or memorandum of appeal in each of the following suits": "(1.) To alter or set aside a summary decision or order of any of the civil Courts not established by letters patent, or of any revenue Court."

Now this an exact description of the effect of the appellant's suit. It is true that, instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and s. 283 of the Civil Procedure Code, under which section the action is brought, recognizes such a suit as not merely an appropriate, but the only mode of obtaining review in such cases.

Their Lordships are accordingly of opinion that the first head of art. 17 of Sched. II. applies to the case. This view is opposed, not only to that of the respondents and of the High Court, but to that of the appellant. Misled by the form of the action directed by s. 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action. Accordingly, on the one hand, the appellant, pointing to her prayer for a declaration, says she pays Rs.10 on that, and, pointing to her prayer for injunction, says she pays other Rs.10 on that. In their Lordships' judgment this is not the proper view of the suit taken as a whole; but, if it were, it would be extremely difficult for the appellant to bring her suit, which asks consequential relief as well as a declaratory decree within the enactment which she invokes.

On the other hand, the respondents equally ignore the essential fact that this is a plaint for review of a summary decision; and they go on to bring the action, treated as an original action,

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within the class of cases where the Court fees are ad valorem of the action. It is not necessary to discuss this in detail; but their Lordships are not satisfied that, even if the value of the action determined the fee, the respondents have rightly ascertained the value. What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs.1,000, while the execution debt was Rs.10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit.

Their Lordships, however, are satisfied that there is in the statute no general or overriding reference to value. The terms of sub-s. 1 of art. 17 (which they hold to apply) contain no reference to value. In like manner the class of suits dealing with arbitration awards is coupled with suits such as that immediately in question; awards may be of value Rs. 10 or of value Rs.1,00,000; and yet no distinction is made. In short, the statute, for good reasons or bad, has dealt with certain actions irrespective of value; and the present action is one of them.

This being a matter of practice, although to be determined by statute, their Lordships would willingly have given much weight to any consentaneous practice. But while the respondents can claim to be supported by decisions of the Calcutta and Allahabad High Courts, there is a contrary decision in the Bombay High Court—*Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (1)—which has the high authority of Sir Charles Sargent, whose judgment is in accordance with the conclusion at which their Lordships have arrived.

It is a singular fact that, while the ratio of the appellant's case is at variance with that which their Lordships adopt, there is only a difference of Rs.10 in the practical result, the appellant having maintained that she was liable for Rs.20, while she was truly liable only for Rs. 10. On the other hand, the sum held due in India was Rs. 1,230, and this was the result of the ad valorem theory. It is to be observed that the appellant did not, as

(1) I. L. R. 9 Bomb. 20.

she should have done, stand on the 1st clause of art. 17 of Sched. II., but, on the contrary, contributed to mislead the Courts by advancing a theory which was as unsound as that of the respondents. Their Lordships think that, in these circumstances, the justice of the case is met by the first respondent (who alone appeard in the suit) paying half of the appellant's costs in the High Court and in England.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to allowed ; that the decrees of the High Court and the Court of the Subordinate Judge ought to be discharged ; that the case ought to be remitted to the High Court with a view to the necessary steps being taken to dispose of the remaining issues reserved by the Subordinate Judge for future consideration ; that the first respondent ought to pay half the appellant's costs in the High Court ; and that the costs in the Court of the Subordinate Judge ought to be dealt with by the Subordinate Judge after the other issues have been disposed of.

The first respondent will pay half the appellant's costs of this appeal.

Solicitor for appellant : *G. C. Farr.*

J. C.* 1907 Nov. 4, 9.

RAJA GOKULDAS AND OTHERS . . . . . PLAINTIFFS;

AND

SETH GHASIRAM . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Transfer of Property Act, s. 88—Construction of Decree— Future Interest fixed after Date for Payment.

Where a decree, in a mortgage suit made under s. 88 of the Transfer of Property Act directed that future interest should be allowed :—

Held that, on the true construction of the section and the decree, future interest must be calculated up to the date of realization, and not merely up to the date fixed in the decree for redemption by the mortgagor.

APPEAL by special leave from a decree of the Judicial Commissioner's Court (July 30, 1904) reversing a decree of the Civil Judge of Narsinghpur (November 4, 1903).

The appellants had, on September 18, 1896, under the provisions of ss 86 and 88 of the Transfer of Property Act, obtained from the Civil Court of Jubbulpore a conditional decree of foreclosure against the respondent, which is as follows :—

"It is hereby ordered that the defendant is indebted to the plaintiffs in the sum of Rs.20,457.4 for principal and interest on the mortgage mentioned in the plaint, and in the further sum of Rs. 1,106.10 for costs, and that upon the defendant paying to the plaintiffs or into Court the amount so due with future interest at 7 per cent. per month from the date of suit, viz., July 22, 1896, on or before the 18th day of March, 1897, the plaintiffs shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiffs or any person claiming under him or under whom he claims, and shall if necessary put the defendant in possession of the property, but that if the payment is not made on or before the said 18th day of March, 1897, the mortgaged property as detailed below,

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

or a sufficient part thereof, shall be sold, and the proceeds of the sale (after paying thereout the expenses of the sale) paid into Court, and applied in payment of what is due to the plaintiffs, and the balance, if any, paid to the defendant or other persons entitled to receive the same. If the decree is not satisfied from the sale proceeds, the balance will be recoverable from the defendant's person and other property."

This decree was made absolute on June 25, 1898, and on July 13 was transferred to the Civil Judge of Narsinghpur for execution. The transferring order calculated interest as due to the date thereof, and recited the amount as Rs.18,322, after deducting Rs. 5,000 paid. On September 21, 1898, the appellants applied for execution, calculating interest to date, and on April 6, 1901, repeated this procedure, the amount then claimed being increased to Rs. 20,719. On August 24, 1903, the respondent for the first time objected that the appellants had wrongfully calculated future interest on the decretal amount to date of execution, and submitted that the said decree on a right construction thereof did not carry interest beyond March 18, 1897, the date fixed for redemption, and admitting as due Rs.11, 581. 14.

Three issues were framed by the Civil Judge of Narsinghpur : 1. (*a*) What is meant by the expression " future interest "? (*b*) Cannot plaintiffs get interest beyond March 18, 1897 ? 2. Is defendant debarred from raising his plea now ? 3. What is still due to plaintiffs under the decree ?

The Civil Judge held that "defendant's contention that future interest should be allowed up to March 18, 1897, only, is groundless." He disallowed the objection with costs. " Future interest,'" he said, "clearly means interest payable after the decree. The decree passed under s. 88, Transfer of Property Act, is the real decree in the case. It clearly awards future interest from the date of the suit. It does not say that this future interest is to be paid up to date fixed for payment of the decretal amount, i.e., March 18, 1897, or up to realization, but as laid down by the Full Benchruling, Allahabad High Court, in *Bakar Sajjad* v. *Udit Narain Singh*, I. L. R. 21 Allah. p. 361, and by their Lordships of the Privy Council, in L. R. 25 Ind. Ap. 179, and L. R. 28 Ind. Ap. 35, there is nothing either in the

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decree or in the law which would prevent the decree holder from getting interest at 7 per cent. per mensem from the date of the suit to the date of realization. Upon principle, apart from authority, statutory or otherwise, it is difficult to see why the mortgagee should not have interest on his money so long as the debt remains unpaid."

In appeal this ruling was reversed. The judgment of the Additional Judicial Commissioner stated that the power of the Court to grant interest for the period subsequent to the date fixed by it for the extension of the mortgagor's right of redemption was concluded by the decision in *Maharajah of Bharatpur* v. *Rani Kanno Dei* (1), and proceeded: "But, having regard to the language of their Lordships' judgment therein, it seems clear that the ordinary power given by ss. 86 and 88 of the Transfer of Property Act, 1882, is a power to make an account up to the date to be fixed for payment, and that the continuation of interest beyond that date is obtained by an exercise of a special power dehors the enactment and inherent in the Court for the due administration of justice; a power derived from a long course of practice which has not, apparently, been upset or discouraged by the Legislature, and which it is equitable to maintain. It therefore seems to me that the proper way to interpret a sale decree of the kind now in question, is to read it as it stands, without any implication in favour of interest being allowed after the last redemption date. That is to say that, unless there are express words granting such interest, the Court must be interpreted as having limited itself to the apparent power given by the statute in ss. 86 and 88 of the Transfer of Property Act."

The Court then held that there was no ambiguity in the decree whatever, and that upon its proper construction no interest after March 18, 1897, runs on the decretal sum or any part thereof. "It is immaterial that the judge might have decreed otherwise had he foreseen the delay in realization. It is equally immaterial that executing Courts and the plaintiffs have hitherto misconstrued the decree. The decree must be construed according to its language, and if the plaintiffs' legal advisers did not detect the

(1) (1900) 28 Ind. Ap. 35.

defect in it and foresee the loss it was likely to cause, that is no reason why some other and more equitable interpretation should be put on it. The order of the Lower Court appeal against is reversed, and execution of the decree must proceed upon the construction of it which is laid down in this judgment, namely, that no interest accrues on any part of the decretal sum after the 18th day of March, 1897."

C. W. Arathoon, for the appellants, contended that the Judicial Commissioner's Court had misapplied the judgment in *Maharajah of Bharatpur* v. *Rani Kano Dei* (1), which was in reality in appellant's favour. There was no reason in law or equity why the mortgagee should not have interest till his debt was satisfied, or why it should cease to run after the mortgagor had failed to redeem on the date fixed by the decree. The judgment of the First Court was correct : see *Sundar Koer* v. *Sham Krishen*. (2)

The respondent did not appear.

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Nov. 19.

The judgment of their Lordships was delivered by

LORD ROBERTSON. Their Lordships have examined the decisions of this Board relied upon by the appellants—*Maharajah of Bharatpur* v. *Rani Kanno Dei* (1) ; *Sundar Koer* v. *Sham Krishen* (2)—and find that they fully sustain the contention of the appellants. They will therefore humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Additional Judicial Commissioner reversed with costs, and the order of the Civil Judge restored.

The respondant will pay the costs of the appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

(1) 23 Ind. Ap. 35. (2) (1906) L. R. 34 Ind. Ap. 9.

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GURU PRASANNA LAHIRI AND OTHERS . DEFENDANTS;

AND

JOTINDRA MOHUN LAHIRI . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Suit for Contribution—Decree for Money—Payments on Account at various Dates—Adjustment of Inequality between the Parties in respect of Interest.

Where in a suit for contribution between parties who were liable inter se in stated shares to satisfy a decree for money, and who had satisfied it by contributory payments in various amounts at different dates extending over a series of years, the final inequality which it was sought to remedy arose by reason of the fact that the payments which stopped pro tanto the running of interest on the decretal amount operated for the benefit of those who had not made them as well as of those who had :—

Held, that this inequality had been satisfactorily adjusted by crediting each party with his separate payments and with interest thereon to the date of final satisfaction of the decree, and then comparing the total with his stated share of the aggregate amount so credited. That aggregate amount represented for purposes of contribution the total aggregate cost at which inter se the common debt had been liquidated.

APPEAL from a decree of the High Court (August 29, 1904), drawn according to the directions contained in the Order in Council, dated March 28, 1904, and upon taking the accounts as directed in the said order.

That order was made in a suit for contribution as between the co-sharers in the estate which was of one Ramanath Lahiri in respect of a judgment debt in effect against the estate, the co-partners therein being liable to satisfy it according to their shares at the date when the judgment was passed.

The judgment of the Judicial Committee (see L. R. 31 Ind. Ap 94), to which the order gave effect, declared that the same shares formed the proper basis for assessing contribution : the total debt having been extinguished by various payments made from time to time by the said co-partners. The order directed with a view to such assessment that the High Court should retake the account between the parties on the principle of computing interest on the total principal of the judgment debt to the

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date of the final extinguishment without regard to the sums from time to time paid on account, and then crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid from the date of payment until the final satisfaction of the said decree in 1889.

The High Court retook the accounts as directed, with the result that Rs.1,39,059 was the total judgment debt, with interest at 6 per cent. per annum from May 12, 1879, the day it was decreed, to September 17, 1889, the day it was finally extinguished, calculated as directed, without regard to the sums from time to time paid by the parties on account. The actual amount paid into Court by the parties which admittedly satisfied the decree was Rs. 1,25,866, the difference Rs.13,193 being the amount by which payments of simple interest had been reduced in consequence of payments on account.

It appeared from taking the other accounts ordered, namely, in respect of the sums from time to time paid on account by the parties, with interest thereon calculated at the same rate, that the total amount with which the judgment debtors were credited amounted to Rs.1, 48,873, which is Rs.9,814 in excess of the said Rs.1,39,059.

Under these circumstances the High Court held that "the most equitable method of removing the discrepancy would appear to be to debit to the different parties sums out of the excess of the latter over the former in proportion to their respective shares in the estate." In other words, the Rs. 9,814 were debited to the parties according to their shares in the estate. The total credit of the parties, after debiting as aforesaid, were then compared with their respective shares of the Rs.1,39,059, and the respective excess or discrepancy in payment adjusted, with the result that the respondent obtained a decree for Rs.3,814 against defendant No. 1, and for Rs 6,178 against defendant No. 2.

The main ground of appeal was that the appellants ought not to have been debited with their respective or any shares of the said Rs.9,814, but that the whole should have been debited to the respondent.

Jardine, K .C., and *C. W. Arathoon*, in support of this contention, argued that the Rs.9,814 was in excess of the decretal

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amount of Rs.1,39,059 as ascertained by the High Court under the direction contained in the Order in Council. Under that direction the appellants were only to be held liable for their share of the figures so ascertained, and there was no liability so far as each appellant was shewn to have contributed the full amount of that share by the amount credited to him in respect of his payments with interest. He was only liable to a further contribution so far as his payments hitherto fell short of his share of Rs.1,39,059. He had nothing to do, according to the true construction of the order, with the Rs.98,14. If the respondent as a result of the accounts was credited with a larger amount than his share of the said Rs. 1,39,059, that could not enhance the liability of the appellants.

Cowell and *De Gruyther* contended that the total of Rs.1,48,873 represented the aggregate cost by which inter se, and for purposes of contribution, the judgment debt had been satisfied. The judgment creditor had been actually satisfied as far back as 1889, and the actual amount paid to him had nothing to do with the relative positions of the debtors in respect of their payments. It followed from the principle on which the sums credited to each debtor had been ascertained, that they had to contribute to the total sum credited to all according to their share of liability in order to ascertain whether the sum credited to each was greater or less than the sum due by each. The Rs.1,39,059 did not represent any actual transaction, but merely what would have been due to the decree-holder at the date when the decree was finally discharged if he had received no payment on account. The Rs.9,814 represented a rebate which he theoretically granted to the debtors, and they were entitled to the benefit of that rebate according to their stated shares.

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Dec. 2.

The judgment of their Lordships was delivered by

LORD COLLINS. The history of this long and complicated litigation, which has now, it is to be hoped, reached its ultimate stage is compendiously stated in the judgment of this Board delivered by Sir Arthur Wilson on March 23, 1904, which is appended to this case, and only a very brief statement is necessary to make the particular point that now arises for discussion intelligible.

In 1882 the parties to this appeal had become liable jointly for the payment of a sum which had been decreed to be paid by them for mesne profits of a certain share in an estate, of which share they had for many years been in wrongful possession. The amount for which the decree was made was finally ascertained on April 3, 1882, as Rs. 85,795, upon which sum interest at 6 per cent. from May 12, 1879, was payable until realization. The shares in the estate of the parties to this action were liable to be seized in execution under the decree. The liability under this decree was finally extinguished by payments made at different times by the various parties to this suit extending down to September 17, 1889, during all which time interest was running on so much of the decreed amount as for the time being remained unsatisfied.

After the liability to the decree holders had been thus satisfied, a dispute which has led to much litigation arose between the contributors as to their reciprocal rights and obligations towards each other, having regard to the amounts of their several contributions, the times at which they had been made, and the different proportions of their interests in the other shares in the estate itself. This litigation was carried up to the High Court at Calcutta, and from thence to this Board, who remitted it to the High Court with directions as to certain accounts to be taken and the consequent relief to be given. The High Court accordingly took accounts and made a decree finding a certain balance payable to the plaintiff, the now respondent. Against that decree the other parties or their representatives, by leave of the High Court, now appeal. They take exception to two mistakes, as they allege, of fact—

(*a*) That the account has been taken and interest calculated from too early a date, namely, from May 12, 1879, instead of from April 3, 1882.

(*b*) That a sum of Rs. 740 should not have been credited to the respondent.

Their Lordships are of opinion that both these objections, which go to fact only and not to principle, fail, for the reasons given by the respondent. The appellants further contended that the Court below have not correctly followed out the directions of

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this Board in the manner in which they have adjusted the shares and obligations of the parties inter se upon the accounts so taken. As pointed out in Sir Arthur Wilson's judgment, the inequality which it was sought to remedy by the accounts directed was that which arose by reason of the fact that the payments which stopped pro tanto the running of interest on the decretal amount operated for the benefit of those who had not paid them as well as of those who had. The provision that in taking the account interest should be allowed on the sums paid from the date of payment adjusted inter se the inequality thus arising between the contributors, and from an account so taken it was possible to assess the exact proportion which each contributor had in fact borne in discharging the common burden. This being ascertained, the amount in fact contributed had to be compared with the share of the common obligation properly falling to him in virtue of his proportionate interest in the estate. The shares in the estate of each of the contributors were not in controversy, and the only figure open to discussion would now be what ought to be taken as the figure representing the total debt to be discharged, for this is what had to be distributed among the contributors and borne by them in proportion to their interests. Three different figures have been suggested in the discussion :

(1.) That which represents the actual sum which was received by the decree holder in satisfaction of his decree, namely, Rs. 1,25,826.

(2.) The sum arrived at under the order of the Privy Council, on the footing that the principal and interest had all been paid on the same day, namely, September 17, 1889, which amounted to Rs. 1,39,059.

(3.) The sum arrived at as the result of the other account directed by the Privy Council, namely, "crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid from the date of payment until the final satisfaction of the decree," namely, Rs. 1,48,873.

Of these figures the first, though it shews the total sum actually received by the decree holder, ignores the relative positions of the contributors towards each other in view of the

fact that the debt was wiped out at the times and in the amounts of the several contributions from time to time made by the debtors; it does not translate into figures the separate and aggregate cost to the contributors at which the debt was wiped out. The second represents only a notional state of facts, and cannot be taken as affording a true total for division according to interests.

It seems to their Lordships that the third figure is that which should be taken as representing between the parties the whole burden which is to be divided among them in proportion to their several interests in the property. The burden to be borne was made heavier to all by reason of the length of time over which the liquidation was protracted, while the rights of individuals are equalized by the allowance of interest on their contributions from the time they were made.

Thus we have in this figure the total aggregate cost at which inter se the common debt was liquidated, and this, therefore, is the burden to be assumed among them in properly adjusted shares.

In their Lordships' opinion, therefore, the account should be taken on this footing, and the amounts of their several contributions already ascertained set off against their several liabilities so adjusted. This is in effect what has been done by the learned judges below, though they have arrived at their result by a somewhat longer process.

Having first in the prescribed method ascertained the amounts contributed by each party to the liquidation, they have in the first instance measured each contributor's share of the burden by treating it as an aliquot part of the second of the above figures, namely, Rs. 1,39,059. They have then ascertained the difference between that figure and No. 3, namely, Rs. 1,48,873, at Rs. 9,814, and, having divided this sum in proper proportions, have added an aliquot part to the burden fallen upon each contributor under the former calculation.

Having thus ascertained the share of the burden and the amount contributed by each, they have decreed the consequential relief.

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GURU PRASANNA LAHIRI v. JOTINDRA MOHUN LAHIRI.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be affirmed.

The appellants will pay the costs of this appeal.

Solicitors for appellant : *Wilson & Co.*

Solicitors for respondents : *Barrow, Rogers & Nevill.*

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Nov. 7, 20.

MUSUMMAT WALIHAN AND OTHERS . . . DEFENDANTS;

AND

JOGESHWAR NARAYAN AND ANOTHER . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Suit by Reversionary Heirs—Widow's Death not proved—Declaratory Decree reversed.

The plaintiffs sued as reversionary heirs on the death of their mother, challenging the validity of certain mortgages by her to the defendant, and praying for possession of the property in suit. They failed to prove the death :—

Held, that thereupon the suit ought to have been dismissed, and that the Courts below had no right or duty to make a declaratory decree as to the paternity of the plaintiffs or the validity of the mortgages.

APPEAL from a decree of the High Court (June 25, 1903), affirming a decree of the Subordinate Judge of Bankipur (March 31, 1900).

Gopi Nath was the owner of a village called Dhawlpur Akowna. He died on November 28, 1859, leaving a widow, Gend Koer, and a daughter, Kewal Koer, who subsequently married one Chandan Lal. On the death of Gopi Nath his widow succeeded him and remained in possession of the estate until her death, on December 2, 1868, when she was succeeded by Kewal Koer.

Gend Koer in 1868 mortgaged the village to the appellants' predecessor, Wahid Ali. Other transactions of borrowing by Gend, and afterwards by her daughter, followed. Eventually on April 23, 1875, Kewal Koer, the daughter, executed a

* *Present* : LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

consolidating deed of mortgage, in which all the previous transactions were included, for Rs. 30,000 in favour of Zahur Uthuk, the son of Wahid Ali, who in 1878 obtained a decree and himself bought at a sale thereof in execution.

On September 14, 1897, the respondents sued as Kewal Koer's sons. They alleged that their mother died on February 10, 1897, and they became thereupon entitled in succession to Gopi Nath's estate. They challenged the validity of the mortgages executed by Gend Koer and Kewal Koer and the sale in pursuance thereof as binding on them, and prayed for possession of the property in suit.

In defence the appellants denied that Kewal Koer was dead; they denied that the plaintiffs were the sons of Kewal Koer, and pleaded that the transactions with Gend Koer and Kewal Koer were binding on the plaintiffs.

The following are the issues so far as material: (1.) Is Musummat Kewal Koer dead? (2.) Are the plaintiffs the sons of Kewal Koer? (4.) Were the sums mentioned in the bonds not fully paid? (5.) Were the debts, or any and what portion of them, incurred on account of legal necessities by the widows?

The Subordinate Judge found that the alleged death of Kewal Koer, was not proved, but that the plaintiffs were the sons of Kewal Koer and Chandan Lal. On the fourth and fifth issues he decided that the moneys had been paid to Gend Koer and Kewal Koer, but that the transactions were not justified by legal necessity, so as to be binding on the plaintiffs. He made a decree in terms following :—

"Ordered that this suit be dismissed and it be declared that the plaintiffs are the sons of Musummat Kewal Koer, and that the properties in claim were not sold for valid expenses. The plaintiffs do recover three-fifths of their costs from the contending defendants, and the said defendants do recover two-fifths of their costs from the plaintiffs. The decretal amount shall carry interest at 6 per cent. per annum till realization."

The High Court affirmed the findings of fact and law as in the judgment of the Court below, and dismissed the appeals which had been instituted by both parties.

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WALIHAN v. JOGESHWAR NARAYAN.

De Gruyther and *Branson*, for the appellants contended that the respondents had no cause of action until the death of Kewal Koer, and, having failed to prove it, their suit should have been dismissed. The Courts had no jurisdiction to make a declaratory decree, and if they had the declarations made were not sustained by the evidence. Reference was made to *Doolhun Jankee Kooer* v. *Lall Beharee Roy* (1); *Rajessuree Koonwar* v. *Indurjeet Koonwar*. (2)

The respondents did not appear.

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Nov. 20.

The judgment of their Lordships was delivered by

LORD ROBERTSON. Their Lordships are of opinion that this action ought to have been dismissed with costs, and that therefore this appeal should be allowed.

The suit was one of the simplest and most plainsailing character, alike in the ground of action and the decree sought. The plaintiffs (the present respondents) claimed to have possession of their mother's property on the ground that she was dead. The Courts held that it was not proved that the lady had died (and indeed there was positive evidence that she was alive). The inevitable inference would seem to be that the suit should be dismissed. The Court which tried the case, however, had very naturally tried the whole case at once, and had to deal with some questions as to the paternity of the plaintiffs, and also as to the validity of certain gifts by the mother. These, however, were merely argumentative steps towards the only decree sought, namely, possession; they were not presented by the plaintiffs as separate and substantive questions affecting rights other than that of possession of their (alleged) deceased mother's estate. As regards one of those questions, it is plain that the validity of the gifts, the lady being alive, could only be determined with her as a party to the suit. Again, the Court might quite well have first tried the issue whether the mother was dead; and, reaching as it did the conclusion that this essential fact was not proved, it is impossible to suggest that it could then have gone on to take up and try the other questions. Yet the present is really the same question. It appears to their Lordships that the circumstance that some of

(1) (1872) 19 S. W. R. 32. (2) (1866) 6 S. W. R. 1.

the media concludendi might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. It is not surprising that no proposal was made in India to amend the record, and the record presents its original plain simplicity.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the decrees in both Courts below ought to be discharged, and that instead thereof the suit ought to be dismissed, with costs in both Courts to be paid by the respondents.

The respondents will pay the costs of the appeal.

Solicitors for appellants: *Watkins & Lempriere.*

MA WUN DI AND ANOTHER . . . . . PLAINTIFFS;

AND

MA KIN AND OTHERS . . . . . DEFENDANTS.

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Nov. 5, 6;
Dec. 2.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Buddhist Marriage—Cohabitation with alleged Habit and Repute—Presumption—Status of "Monkey Wife"—New Claim by Appellant, not submitted to Lower Courts—Construction of Issue.

Before applying the general presumption of marriage arising from cohabitation with habit and repute, there must be some body of neighbours before repute can arise, and the habit and repute must be of that particular status which in the country in question is lawful marriage:—

Held, that it cannot arise where there is no tangible evidence of recognition of a woman in her quality of wife by people external to the house in which she lives, and where substantially the only evidence is the use of the word "wife" in reference to her, in accordance with a local custom of applying it to persons whose status is not matrimonial.

Where an appellant claimed a share of the estate in suit under an issue which had been treated by the parties and both Courts as assuming a marriage and his own legitimacy, *held*, that he could not in appeal claim a share as an illegitimate son on the ground that the issue was susceptible of a construction which included such claim.

APPEAL from a decree of the Chief Court of Lower Burma (March 19, 1906), affirming a decree of the District Court of Amherst (June 27, 1905).

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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MA WUN DI v. MA KIN.

The appellants sued as widow and son of Maung Gale, deceased, to recover a half-share of his estate, alleging a lawful marriage in 1887 between Ma Wun Di and Maung Gale at Chiengmai, followed by cohabitation and the legitimate birth of the second appellant.

The respondent Ma Kin, who was admittedly widow of Maung Gale, denied the alleged marriage, and stated that Ma Wun Di was merely one of the numerous concubines taken by Maung Gale during his stay in Siamese territory according to the practice of Maulmein foresters when visiting and residing in Siamese territory.

The issues included one which was as follows: "Whether either or both of the plaintiffs are entitled to a share in the estate left by Maung Gale? And, if so, to what share?" The District Judge found: "I am not satisfied that any wedding ceremony, as alleged, took place."

"Holding that there was no wedding ceremony, the next point to consider is the conduct and relationship of Maung Gale and Ma Wun Di. On this point it is admitted that Maung Gale kept three other Shan girls in the same house with Ma Wun Di. That each occupied a separate room, and that Maung Gale divided his attention amongst them, sometimes eating and sleeping with one of them and sometimes with the others. The witnesses, one and all, say that Maung Gale acknowledged Ma Wun Di as his wife, and that she was regarded as such by the public."

He concluded: "I am satisfied that Maung Wun Di was merely a 'monkey wife,' or temporary mistress of Maung Gale, and not his legal wife."

With regard to the status of monkey wife, the District Court's judgment refers to s. 14 of the notes on Buddhist Law, as translated by S. Minus, p. 3 of Jardine's notes. The passage cited says: "Most Europeans and even some of the younger Burman magistrates are ignorant of the meaning of the terms 'monkey wife' and 'monkey husband' (myaukma and myaukhti). They relate to the habits of monkeys, who usually live in distinct groups, in which a male is often united to one or more particular females, but if gone abroad or strayed away to another group, finds there

sufficient consideration for his wants to have a female allotted to him, especially if he is a powerful monkey ; or he will appropriate a temporary partner and take the consequences of being compelled to remain in the new tribe or of recognizing his newly acquired partner as consort or of being driven out of the community. The lower and formerly oppressed races of Burma sometimes allowed their guests to cohabit with unmarried females of the household ; such females became the myaukmas during the guests' stay ; and what was originally an act of hospitality was afterwards claimed as a privilege by Burman lords when absent from their families and residing temporarily in other places. In the same way a married merchant coming from a distant place for trade may keep a woman as if she were his wife, she attending to his business and cohabiting with him only ; their temporary relation is that of myaukma and myaukhti : the woman may thus support herself as the temporary wife of several men in succession without sinking to the level of a courtesan. A married woman if she cohabits in this way with a guest or visitor, also becomes a myaukma and he a myaukhti, his status being similar to that of 'len-ngay' or lesser husband. It is by inquiry into the customs of the Karens and Chins that fuller acquaintance will be made with these subjects."

The Chief Court affirmed the finding of the District Judge, the Chief Judge saying : " For the reasons stated above, I agree with the Lower Court that Ma Wun Di was not the legally married wife of the deceased Maung Gale."

Those reasons were that he considered the evidence quite as consistent, and in fact more consistent, with concubinage than with marriage. "It is quite clear," from the evidence of Maung Nyein, " that there was no marriage ceremony." He added that "the conduct of Ma Wun Di subsequent to the death of Maung Gale raised the strongest inference that she did not regard herself as having the status of wife. She allowed the whole of Maung Gale's property to be taken possession of, first by the British consul and then by Maung Gale's relations from Maulmein, without raising a protest. Though Maung Gale died in 1894, and though a law suit was going on about his estate for many years, she never intervened, and it was not till 1902, eight years after

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Maung Gale's death, and after she had herself married again, that she took any steps to assert her rights as a married woman or to obtain a share of his estate." He further found that Maung Gale did not regard Ma Wun Di as having the status of a wife; that it was customary for Burmese foresters from Maulmein who have to spend long periods in Siam on business to take concubines in that country; that Maung Gale had several living in the same house with Ma Wun Di; and that the evidence did not shew that she differed in any way from them, except that she may have been the head of the harem.

Roskill, K.C., *McCarthy*, and *T. E. Forster*, for the appellants, contended that these findings should be reversed. The Courts below threw the onus probandi on the appellants, and required them to prove a marriage. But cohabitation was proved, with habit and repute, and therefore marriage should have been presumed, and the onus was on the respondents to disprove the same, and no evidence was given with that view. The Chief Court held that the presumption did not arise. It was contended that this was erroneous even in a district where concubinage was not considered immoral. The cohabitation with Ma Wun Di was continuous, and continued until Maung Gale's death, which was not the case with the other women kept by him. Reference was made to *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*. (1) The presumption was not weakened by the admitted fact of a previous marriage with the respondent. Polygamy was allowed by the Burmese Buddhist law, which was similar to that of the Siamese Shan States; where polygamy was frequent among the richer classes. Reference was made to "The Kingdom of the Yellow Robe," 3rd ed., by Ernest Young, late of the Education Department of Siam, pp. 98 and 99, and "Siam in the Twentieth Century," by J. G. D. Campbell (1904), pp. 113, 131. They also contended that the evidence was sufficient to establish the fact of marriage; otherwise, even if there were no valid marriage, the second appellant, as the illegitimate son of Maung Gale, was entitled under Buddhist law to a share in the inheritance, inasmuch as his mother lived with and ate out of the same dish

(1) (1881) 6 App. Cas. 364, 371.

as the deceased Maung Gale. Neither Court had dealt with this contention, nor had it been raised during the progress of the case, but the issue raised as to the second appellant's title was wide enough to include it, and it was not too late to establish the claim.

Cowell, for the respondents, was not heard.

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Dec. 2.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The question in this appeal is one of fact; and it has been decided against the appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage.

The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connections not reprobated by opinion, but not constituting marriage.

In the present case the broad facts are these: a domiciled Burman, Maung Gale, has his house and wife at Maulmein, in Burma; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Wun Di, who, for shortness, will be called the appellant. The appellant has maintained that, while the other women were concubines, she was a wife, taken as a second wife,

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the first wife being all the time in Burma. The opposite contention is that, while the appellant was older than the other women (who all lived in the same house) and had, for that reason and also for reasons of choice, a stronger hold on the man yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connection; but her counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public; and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage than the use of the word "wife" by some of the witnesses; and the most cursory, as well as the most careful, examination of the evidence shews that it is applied to persons whose status is not matrimonial.

Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are apposite and weighty: "It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectable. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife; and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife."

There remains to be noticed one point which the appellants' counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale in 1887 obtained a certificate of nationality as "a British subject, proposing to travel in Siam." In 1891 her renewed it; and as part of the docket of renewal, which is signed by the acting vice-consul, are the words: "Names of female relations living with Maung Gale: (1.) Ma Wun Di, wife; (2.) I Mun, sister-in-law." The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the vice-consul is not proved to have had any personal knowledge of these people at all, and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who on no theory was a naturalized British subject. The truth probably is that the entry is put in merely as an item of information identifying Maung Gale, in addition to those given in the body of the certificate.

The appellants' counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage; and, the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court, their Lordships are unable to entertain this question.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Bramall & White.*

Solicitors for respondents: *Gregory, Day & Co.*

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RAJA RAI BHAGWAT DAYAL SINGH AND OTHERS. . . . . } PLAINTIFFS;

AND

Oct. 29, 30, 31; *Nov.* 4. 1908

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DEBI DAYAL SAHU AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL

Indian Law of Champerty and Maintenance—Speculative Sale of Property in Suit valid—Effect of unconscionable Bargain as regards Third Parties—Sales by Hindu Widow—Justifying Necessity not proved—Indian Contract Act, s. 196.

The English law as to maintenance and champerty is not applicable to India.

On the death of the last full owner (an infant) of the villages in suit, his grandmother succeeded thereto, and on her death two of the appellants were his nearest heirs, and sold the villages to the first appellant on terms that the bulk of the purchase-money should be payable on recovery thereof from the respondent, who was in possession under purchases from the grandmother, the infant's aunt and stepmother joining in the conveyances :—

Held, that the sale to the first appellant was not void as being champertous or contrary to public policy. Assuming an unconscionable bargain as between the appellants, they jointly sued to give effect to it, and the respondent could not be heard to impugn it on that ground.

Held, with regard to the respondent's purchases, that the onus of proving justifying necessity was not discharged. The evidence shewed that the grandmother did not incur the debts alleged to occasion that necessity, and she could not, under s. 196 of the Indian Contract Act, ratify them by being party to the sale deeds.

CONSOLIDATED APPEALS from two decrees of the High Court (July 20, 1903), modifying two decrees of the Subordinate Judge of Zillah Ranchi (December 20, 1899), and dismissing the appellants' suit with costs.

The main questions in this appeal are whether the suit is maintainable on the ground of champerty and maintenance, and whether two deeds of sale executed by certain Hindu women are valid and binding on the male reversioners to the estate of the last male owner in possession.

* *Present* : LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

The first of the two deeds of sale was executed on January 19, 1887, by Jileb Koer, widow of Thakurai Tilakdhari Singh, Aprup Koer, widow of Thakurai Kali Charan Singh, and Etraj Koer, widow of Thakurai Ram Saran Singh, in favour of the respondent Debi Dayal Sahu. The property sold consisted of the villages of Chiyanki and Ganka.

The second deed of sale in dispute was executed on May 15, 1891, by the same three widows in favour of N. A. Hodges, who on December 1, 1893, sold to the said Debi Dayal Sahu. It related to the village of Lalgara.

Jileb Koer died on November 22, 1894. She was grandmother to Narayan Singh, the last full owner of the villages in suit, and succeeded on his death in 1879 to the limited interest of a Hindu widow as his nearest heiress. On her death the second and third appellants became entitled as Narayan's next heirs. They on November 29, 1895, sold the whole of their interest in Narayan's estate to the first appellant, Raja Rai Bhagwat Dayal Singh, for Rs. 52,600. Of this sum Rs. 600 were paid; the remainder was payable only in the event of the vendee's success in recovering the property in suit.

Two suits were brought in 1898 to recover, on behalf of the first appellant alone, possession of the villages from the respondent Debi Dayal Singh; who was sole defendant to the first suit, his co-defendants in the second suit including Sowton, the executor of Hodges.

The defence to either suit was that the suit, as framed, was not maintainable and ought to be dismissed, on the ground that the conveyance to the appellant raja was without consideration, collusive and fraudulent, immoral, and opposed to public policy, being made for the purpose of gambling in litigation and the encouragement of unrighteous suits. It was further pleaded that the suit was barred by limitation, the possession of the three ladies being adverse to the vendors to the said raja, and the possession of Etraj Koer being adverse to the other two. Lastly, it was alleged that both the sales under which the respondent claimed were made under circumstances of legal necessity, binding on the reversioners to Narayan Singh's estate.

The Subordinate Judge decided that no one of the three

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women who executed the deeds under which the respondent claimed had other than a Hindu woman's estate in the villages in suit; that the true heiress of Narayan Singh was Jileb Koer; that Etraj Koer had not acquired a title by adverse possession against her; and that neither the three women jointly, nor any one of them, had acquired a title by adverse possession against the reversioners. He also decided that the appellants' right to sue accrued on the death of Jileb Koer, and that in consequence the suit was not barred by limitation. But he held that the conveyance under which the first appellant claimed title from the other two was not a bona fide and valid deed, but was gambling in litigation, immoral, and not enforceable on grounds of public policy; and that, the conveyance failing, the title of the second and third appellants remained, and that they were entitled to a decree, notwithstanding the relief claimed in the suit. He then dealt with the issue how far the sales in suit, that is, those executed by the three women, were justified by legal necessity, and found that legal necessity was proved as regards a sum of Rs. 11,198, and gave decrees for possession to the said two appellants on payment of that amount.

The High Court in appeal concurred with the finding of the Court below as to the character of the transaction under which the first appellant claimed, but held that on this finding the suit should have been dismissed. They, however, went on to consider with reference to the evidence the two questions whether there was legal necessity for the alienations under which the respondent claimed, and whether they were made for adequate consideration. Both of these questions they answered in the affirmative in favour of the respondents.

As to the first question, they pointed out that by reason of the fact that the widows failed to pay interest on the debts left by Ram Saran, and failed to discharge those debts for many years, the amount of liability on those ancestral debts eventually amounted to a very large sum, which in their view should be taken in its entirety as chargeable against the reversioners. With regard to the question of the costs incurred in litigation, they pointed out that the women paid their pleaders at extravagant rates, and that the exact amount spent in this way was not

established by the evidence. But the learned judges considered that the estimate of the expenditure under this head given by the defendants in their written statement, namely, Rs. 20,000, was not excessive, and they considered that this sum, together with interest at the high rates charged by the money-lenders for many years, constituted a charge which justified the alienations of the family estate.

With regard to the expenses of the marriages which took place in 1884, the learned judges considered that they must have amounted to not less than Rs. 12,000. This sum, they observed, was also borrowed at heavy rates of interest, and, by reason of the failure of the widows for many years to discharge either principal or interest, the accumulated liability must have amounted to not less than double or treble the original amount. This outstanding total was also regarded as a circumstance of legal justification for the alienations in question.

The High Court then pointed out that in their opinion there was no ground for the conclusion that the purchasers had taken advantage of the widows; and they also said: "It is clear that the purchasers made sufficient inquiries as to the existence of necessities which would have justified the ladies in alienating the family property, even if the debts which they had to pay were debts of their own contracting, or debts for the liquidation of which they would not be legally entitled to sell the property." In the result the High Court reversed the decision of the Subordinate Court, and passed decrees dismissing both of the suits with costs throughout.

Cohen, K.C., and *Kenworthy Brown*, for the appellants, contended that the assignment by the second and third appellants to the first appellant was valid and binding. Accordingly the first appellant was entitled to maintain this suit; otherwise his assignors' title to maintain it as the next heirs of the deceased Narayan was not impeached, and they at least were entitled, if their assignment was invalid, to decrees for possession, with mesne profits. The suits should not have been dismissed. With regard to the doctrine of champerty and maintenance, that had no application in India. As regards English law on that

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subject, reference was made to *Bradlaugh* v. *Newdegate* (1); *Alabaster* v. *Harness*. (2) As regards Indian law on that subject, see *Ramcoomar Coondoo* v. *Chunder Kanto Mookerjee* (3); *Kunwar Ramlal* v. *Nilkanth* (4); *Achal Ram* v. *Kazim Hussain Khan*. (5) It was settled law in India that the doctrine of champerty and maintenance did not apply, and it was too late to contend that the assignment in question was invalid and illegal as being opposed to public policy.

It was also contended that the respondent could not support a title derived from the conveyances in 1887 and 1891 by the three widows, who apparently were in possession of the property from the time of Narayan's death. They were the result of undue influence, were unfair and unconscionable, were entered into without any independent advice, and their nature was not duly explained. Further, the payment of the consideration was not proved, nor was it shewn that there was any sufficient legal necessity to justify the alienations, nor that the purchasers made due inquiries as to the existence of any such necessity and in good faith believed it to exist. The respondent's pleadings shewed that he acted as if he were dealing with an absolute owner, who had acquired title by adverse possession, and not with a widow heiress with a limited title. The onus was on him to prove the affirmative of these questions, and his former contention that he derived title from Etraj Koer, and not from the heiress Jileb Koer, together with the evidence shewing that his transactions and negotiations were chiefly with Etraj, and not with Jileb, justify a strict scrutiny of the evidence by which he seeks to discharge that onus. The bulk of the consideration of the earlier deed comprised debts incurred by Etraj Koer with the accretion of interest. As regards the items allowed as necessary by the Subordinate Judge, no question was raised in this appeal. They were not sufficient to validate the deeds. Reference was made to *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (6); *Amarnath Sah* v. *Achan Kuar* (7);

(1) (1883) 11 Q. B. D. 1.
(2) [1894] 2 Q. B. 897.
(3) (1876) L. R. 4 Ind. Ap. 23, 39, 47.
(4) (1893) L. R. 20 Ind. Ap. 112, 115.
(5) (1905) L. R. 32 Ind. Ap. 113, 118.
(6) (1861) 8 Moo. Ind. Ap. 529.
(7) (1892) L. R. 19 Ind. Ap. 196, 202.

Kameswar Pershad v. *Run Bahadoor Singh* (1); *Shamsunder Lal* v. *Achhan Kunwar* (2); *Tika Ram* v. *Deputy Commissioner of Barabanki* (3); and *Deputy Commissioner of Kheri* v. *Khanjan Singh*. (4) It was contended that the Subordinate Judge's decree should be restored, subject to the important modification that it should be in favour of the first appellant, but retaining the same conditions as those under which it was made in favour of the second and third appellants. They all three joined in enforcing the title of the first appellant, and, so far as any questions were capable of being raised between assignor and assignee, they were not raised, and could not be raised, between them in this suit; and the respondent was not affected by them, and could not rely on them for the purpose of impeaching this conveyance.

Sir R. Finlay, K.C., and *De Gruyther*, for the respondents, contended that the conveyance under which the first appellant claimed was void. The English law of champerty and maintenance is not as such applicable to India; but it was contrary to public policy to permit a transaction of the nature of that in question, where a stranger comes in to buy, at an unfair and inadequate price and in a spirit of gambling, a right to litigate in reference to property and transactions in which he had no interest, for the mere chance of carrying that litigation to a successful issue, the payment by him of the bulk of the purchase-money being dependent on his success in recovering the property. The result would be to encourage speculative litigation and the acquisition of doubtful interests in that view. There is a distinction between an actual sale of property the subject of litigation and a contingent sale subject to its being recovered. Reference was made to *Tarasoondaree Chowdhrain* v. *Collector of Mymensingh* (5); *Achal Ram* v. *Kazim Hussain Khan* (6); Stephen's Commentaries, 14th ed. vol. 4, bk. 6, c. 8 (heading 13, "Champerty"), p. 235; Digest, bk. 44, tit. 6, pars. 1, 2, 3, Code, bk. 4, tit. 35, par. 22; bk. 8, tits. 36, 37, pars. 2, 4; Troplong's Droit

(1) (1880) L. R. 8 Ind. Ap. 9.
(2) (1898) L. R. 25 Ind. Ap. 183, 191.
(3) (1899) L. R. 26 Ind. Ap. 97, 99.
(4) (1907) L. R 34 Ind. Ap. 72.
(5) (1873) 13 Beng. L. R. 495.
(6) L. R. 32 Ind. Ap. 113, 118.

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Civil Explique, 5th ed. 1856, tit. "De la vente," vol. 2, p. 482, par. 985. The Transfer of Property Act, s. 135, does not apply to a claim to immovable property. It was further contended that the Subordinate Judge ought to have dismissed the suit, having regard to the terms of its prayer, when he found that the conveyance to the first appellant was void. To make a decree in favour of the other appellants was not justifiable under the prayer for general relief, and involved an amendment to the plaint, after the trial was concluded. Reference was made to the Civil Procedure Code, s. 53 and s. 13, expls. 1 and 2; *Cargill* v. *Bower*. (1)

It was further contended that the High Court was right in finding, on the evidence, that the alienations under which the respondent claimed were valid as having been made under justifying necessity: see Mayne's Hindu Law, 7th ed. s. 634, pp. 852-4.

Cohen, K.C., in reply, as to the assignment to the first appellant, contended that the French authorities cited were irrelevant. The Roman authorities were unnecessary, for English law makes champerty and maintenance illegal. Reference was made to *Hutley* v. *Hutley* (2); Principles of German Civil Law, by E. J. Schuster, 1907, p. 119, par. 120; *Tarachand* v. *Suklal* (3); Indian Contract Act, s. 30. As to the alienations to the respondent, see *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*. (4)

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Jan. 24.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. These consolidated appeals relate to three villages, Chiyanki, Ganka, and Lalgara, and the substantial conflict is between the first appellant and the first respondent.

The villages, with others, were formerly the property of Ram Saran Singh, who on his death was succeeded by his infant son Narayan. Narayan died, while still an infant and unmarried, on August 7, 1879, and left surviving him his grandmother Jileb Koer, an aunt Aprup Koer, widow of Ram Saran's brother, and a stepmother Etraj Koer, widow of Ram Saran. Of these, the

(1) (1878) 10 Ch. D. 502, 508.
(2) (1873) L. R. 8 Q. B. 112.
(3) (1888) I. L. R. 12 Bomb. 559.
(4) (1869) 13 Moo. Ind. Ap. 209.

grandmother was heir to the boy's property, with the limited interest of a Hindu female inheriting from a male. The three ladies appear to have lived together down to the death of the grandmother, which took place on November 22, 1894.

On the death of the grandmother the inheritance again opened, and the second and third appellants, Bhanpertap Singh and Kirpa Narayan Singh, were then the nearest male heirs of the deceased boy. Those two persons, on November 29, 1895, purported to sell the three villages in question to Rajah Bhagwat Dayal Singh, the first appellant. And that is the title under which he claims.

The first respondent, on the other hand, as the case is now put on his behalf, claims under two sale deeds executed, as it is now said, by or on behalf of the grandmother, Jileb Koer, the sales being, it is contended, justified by necessity so as to pass the whole inheritance. The first of these deeds bore date January 19, 1887. It purported to be a conveyance by way of sale, by the three ladies who have been mentioned, of the two villages Chiyanki and Ganka to the first respondent. The second deed was dated May 15, 1891. It purported to be executed by the same three ladies in favour of one Hodges, and to convey to him by way of sale the village Lalgara. Hodges afterwards conveyed to the first respondent.

The present suits were brought on August 29, 1898, in the Court of the Subordinate Judge at Ranchi. The plaintiffs were the first appellant and the two persons from whom he purchased. The sole defendant in one suit and the substantial defendant in the other was the first respondent. The first suit related to the village Lalgara, the second suit to the villages Chiyanki and Ganka. The claim in each case was for possession and mesne profits.

The first question raised in the case and argued on the appeals was whether or not the sale by the second and third appellants to the first appellant was void in law, so as to pass no title, on the ground that it was champertous or contrary to public policy.

For the respondents it was boldly argued that, although the English law as to maintenance and champerty is not, as such,

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applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases—*Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) ; *Kunwar Ram Lal* v. *Nil Kanth* (2) ; *Achal Ram* v. *Raja Kazim Hussain Khan* (3)—before this Board a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which would certainly have been void if champerty avoided transactions in India.

It was further argued that the transaction in question was contrary to public policy, and void on that ground, by reason of the provision as to payment of the purchase-money by the first appellant to the second and third. The purchase-money was fixed at Rs. 52,600, of which Rs. 600 was to be paid down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

It was further said, and this was relied upon in the Courts in India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between assignor and assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present actions. Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail.

The second question that has to be considered is whether the respondent has shewn a good title in himself by purchase from Jileb Koer, the grandmother, under the two sale deeds mentioned, and under such circumstances as to make that title effectual against the reversionary heirs.

(1) L. R. 4 Ind. Ap. 23. (2) L. R. 20 Ind. Ap. 112.
(3) L. R. 32 Ind. Ap. 113.

The Subordinate Judge, who tried the cases, held that the conveyances were not good, but he allowed, in favour of the first respondent, certain sums which he considered to have been advanced for purposes of legal necessity ; and, whilst giving a decree to the appellants and plaintiffs for possession of the property, he made that decree conditional upon the payment to that respondent of the sums held to have been advanced for legitimate necessities. On the argument of these appeals Mr. Cohen, for the appellants, accepted the propriety of this mode of dealing with the case, and assented to the allowance so made by the Subordinate Judge.

The High Court, on appeal, differed from the first Court, and held that the necessity for the sales in question was established.

Before dealing further with this question, it must be noticed that the case now contended for is not the case raised on the pleadings and relied upon at the trial. The respondent in his written statement alleged a title derived, not from Jileb Koer, but from Etraj Koer. He said, in paragraph 21, that " Etraj Koer was no heir to Narayan Saran Singh, and that she acquired an absolute right by adverse possession " ; in paragraph 23 " that it is not true, as the plaintiffs allege, ... that on the death of Narayan Saran Singh, Jileb Koer succeeded as heir and was in possession up to her death ; the fact is . . . . that Etraj Koer alone was in such possession until her death " ; and in paragraph 25, that " Jileb Koer and Aprup Koer never took the estate of Narayan Saran Singh as heir, and the fact of their joining in the documents as persons executing the deeds of sale and the prior deeds was a matter of form of evidence of members dependent for maintenance on Etraj Koer, and was merely a surplusage " ; and it was added in paragraph 26 that, " even if Jileb Koer were to have taken the estate . . . . by inheritance, she would take it in absolute state . . . . under the provisions of Mitakshara law, and so also if she was made a co-sharer by Etraj Koer in Etraj Koer's right." In his evidence given at the trial the respondent endeavoured to maintain the case that his title was derived from Etraj Koer and was good on that account.

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks

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to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

These considerations apply with special force to the present case. The earlier transactions of the first respondent were with Etraj Koer, and there is no satisfactory evidence to shew that Jileb Koer, the real owner, took part in them, or authorized them in any way.

It was argued, however, that, if Jileb Koer was not shewn to have authorized the earlier transactions, she had ratified them by being a party to the later documents, and particularly the two sale deeds. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognized in s. 196 of the Indian Contract Act. Looking to the substance of the matter, it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could, by acts ex post facto, charge upon the estate which she represents obligations not originally binding upon it.

With regard to the first of the sale deeds now in question, when the details which make up the consideration come to be examined, it appears that they include one sum of Rs. 1,500 which the Subordinate Judge credited to the first respondent in the manner already explained. Apart from this sum the great bulk of the consideration for this sale deed consists of debts originally incurred by Etraj Koer with accretions of interest and compound interest. Their Lordships are of opinion that this deed was correctly estimated by the Subordinate Judge.

The case as to the second sale deed is not quite so simple. With regard to it the Subordinate Judge gave credit to the first respondent for considerable sums as having been advanced for real necessities. As to the rest of the consideration for that

deed, he held that necessity had not been established. In coming to this conclusion, he took into account not only the more general considerations already referred to, but also certain circumstances peculiar to the case—that the lady who alone had any power to convey was old, and had no independent advice to guide her, and that the first respondent was in a position to exercise considerable influence over her affairs. Their Lordships think the Subordinate Judge was justified in taking all these matters into his consideration; and they see no sufficient ground for rejecting his conclusions.

There remains one other point for consideration The plaintiffs claimed not only possession, but mesne profits. The Subordinate Judge rejected the latter claim. Their Lordships are of opinion that, as the deeds of sale are not good as such, the claim for mesne profits is well founded. In argument it was conceded that on the other side of the account interest at 6 per cent. should be allowed on the sums credited to the first respondent. The amounts thus to be allowed on the one side and on the other can be adjusted in execution proceedings.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, that the decrees of the High Court should be discharged, with costs to be paid as regards the first decree by the present respondents other than Sowton, and as regards the second decree by the first respondent; that the decrees of the Court of the Subordinate Judge should be discharged, and that instead thereof it should be ordered that, upon the first appellant paying to the first respondent the sums found in favour of the latter by the Subordinate Judge with interest at 6 per cent. per annum, the first appellant do recover possession of the property in suit, together with mesne profits to be ascertained in execution proceedings, and costs to be paid by the first party defendants in the first suit and by the sole defendant in the second suit.

The respondents other than Sowton will pay the costs of these appeals.

Solicitors for appellants : *Withall & Withall.*
Solicitors for respondents : *T. L. Wilson & Co.*

J. C.* BAIJNATH RAM GAENKA . . . . . PLAINTIFF;

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AND

Nov. 4, 5; RAMDHARI CHOWDHRY AND OTHERS . . DEFENDANTS.

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Jan. 24.

AND

RAMDHARI CHOWDHRY AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Right of Pre-emption—Performance of Talab-i-istish-had—Conflicting Findings as to necessary Promptitude—Payment by Purchaser of Mortgage Money to Pre-emptor as Mortgagee—Alleged Relinquishment of Pre-emptor's Right.

The right of pre-emption conferred by Mahomedan law must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, any unreasonable or unnecessary delay being construed as an election not to pre-empt :—

Held on the evidence, that the High Court had overruled on insufficient grounds the finding of the Subordinate Judge that a delay of two days in making the second claim with witnesses was not under the circumstances fatal to the exercise of the right.

Where the actual purchaser had paid money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming a mortgage on the property which he had purchased, and the plaintiffs, who were mortgagees as well as pre-emptors, took the money out of Court :—

Held, that they did not thereby recognize the title of the purchaser, but merely that he had a right to redeem until he was pre-empted.

CONSOLIDATED APPEALS from two decrees of the High Court (January 20, 1904), which dismissed two suits with costs, thereby reversing two decrees of the Subordinate Judge of Monghyr (March 31, 1900), which were in favour of the appellants, to the effect that each plaintiff should get a decree for a moiety of the property in suit as a pre-emptor upon his depositing in Court half the price, namely, Rs. 37,000 within a month, each plaintiff to have liberty to deposit the full price in case of default by the other, and in that case to obtain possession of the whole property sold.

* *Present* : LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

The suits were brought by predecessors of the appellants on the same day, June 30, 1898, to enforce in each case, as against the vendor and purchaser of the properties in suit, the plaintiff's right of pre-emption on account of his being a co-sharer therein. Each plaintiff made the other a co-defendant to his suit, and claimed a right of pre-emption over the whole, but if found entitled to only one-half of the properties in suit, then that each plaintiff should be awarded possession over a moiety of the same on depositing the purchase-money in equal halves.

The sale in question was effected on December 17, 1897, by the respondent Anupbati Koeri, one of the two widows of Kamla Pershad Singh, to Nirbhoy Chowdhry, the first defendant, since deceased, and related to her four-anna share (with some exceptions) in the properties named in the schedule to the plaint. The two plaintiffs had been in 1891 joint purchasers in equal shares of the eight-anna share therein, which then belonged to Kamla Pershad Singh's brother Jugal Pershad. They were also joint purchasers in equal shares on July 9, 1897, of the co-widow's four-anna share therein; and accordingly were at the time of the sale on December 17, 1897, entitled to a six-anna share each in the said properties.

The plaints narrated the above sales, and also the circumstances under which the plaintiffs had obtained possession of the said twelve-anna share, and also at a later date of Anupbati's four-anna share by virtue of a transfer from a zurpeshgi mortgagee thereof.

The plaints vary in one respect. Jowhuri Lal, the predecessor of the appellant in the second appeal, alleged that he first heard of the sale in question on December 20, 1897, and Mangni Ram, the predecessor of the appellant in the first appeal, alleged that he first heard of the said sale on January 5, 1898, at 4 P.M. There are concurrent findings of fact that both plaintiffs went through the ceremony of talab-i-mowasibat in due form and at the proper time. The Courts differed as to the due performance in due time of the ceremony of talab-i-istish-had.

The facts with regard to this latter ceremony were thus found by the Subordinate Judge: "On the evening of December 20, 1897, Jowhuri Lal was told in general terms that a sale had

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been effected on December 21, 1897. He sent a man to his agent at Gogri to verify the fact of the sale, and to obtain a copy of the deed of sale if registered. From December 21 to 26, 1897, the office of the registrar was closed. On December 27, 1897, the agent applied for a copy of the deed of sale, which he received on December 30, 1897, and forwarded by registered post to Jowhuri Lal, to whom it was delivered on January 4, 1898. On January 5, 1898, Mangni Ram consulted a local barrister. On January 6, 1898, both Mangni Ram and Jowhuri Lal applied for a police guard to protect their agents, who were taking the purchase-money to tender the same to Nirbhoy Chowdhry at Maheshpur, and on January 7, 1898, the talab-i-istish-had was made at his house. On January 8, 1898, arrangements were made to go to Anupbati Koeri's house and to the property sold. January 9 was a Sunday and no steamers were running. On January 11 and 12, 1898, the talab-i-istish-had was made on the property itself and at the house of Anupbati Koeri."

On this evidence the Subordinate Judge found "that there was no unreasonable delay or any act of gross negligence in the performance of this ceremony." The Subordinate Judge noted in his judgment that after the institution of the suits the plaintiffs withdrew from Court the amount of the sudharni (i.e., mortgage) debt deposited by the defendant Nirbhoy Chowdhry on account of his share of his vendor Anupbati, and gave up possession of the disputed property; and that the plaints were accordingly amended.

The High Court was "unable to agree with the Subordinate Judge that it (namely, the talab-i-istish-had) was performed with the necessary promptitude." It was not performed with the least practicable delay. Neither of the plaintiffs went to the purchaser's house till January 7. "The evidence discloses that there was considerable and certainly sufficient delay to invalidate the talab-i-istish-had on the part of both plaintiffs." There was an unnecessary delay of three days in getting a copy of the kobala; at least two days' further delay in Jowhuri's accepting from the post office the registered copy thereof. "He was evidently during these two days trying to gain time for the purpose of reflection." It is unquestionable, the High Court

added, that the further delay of Jowhuri from January 4 to 7 was unnecessary. So also the delay of the plaintiff Mangni from January 5 to 7. The excuses given that they consulted a barrister and obtained a police guard to protect the carriage of money, which it was unnecessary in point of law to tender, were insufficient in both cases, doubly so in Mangni's case, as he took his money in notes, which he could carry on his person.

The High Court also held that the plaintiffs had waived their rights. "Their agents told the defendant Anupbati and her nephew Jadubir that they would give no more, and that if Anupbati would not accept the Rs. 36,000, she was at liberty to sell the property to whomsoever she pleased." The plaintiff Jowhuri Lal, moreover, was well aware of the negotiations, and endeavoured to frustrate them.

De Gruyther and *G. H. A. Branson*, for the appellants, contended that on the evidence the Subordinate Judge was right in finding that the second ceremony of talab-i-istish-had had been duly and properly performed with as little delay as was possible. Reference was made to Hamilton's Hedaya, bk. 38, c. 2; *Jarfar Khan* v. *Jabbar Meah* (1); Baillie's Digest of Mahomedan Law, bk. 7, c. 2, pp. 481, 489, 507; *Syad Amjad Hossein* v. *Kharag Sen Sahu* (2); Ameer Ali's Mahomedan Law, 3rd ed. vol. 1, p. 607. It was further contended on the evidence that the appellants did not acquiesce in the sale to Nirbhoy, and had not, by their conduct or otherwise, waived their right to pre-empt. Act XII. of 1887, s. 37, was referred to as shewing the law to be applied, the parties to this case being Hindus.

Jardine, K.C., and *Cowell*, for the respondents, contended that the onus was on the appellants to shew that they had performed the ceremonies, which were a condition precedent to the exercise of rights of pre-emption, with the necessary promptitude and the least possible delay. A co-sharer's right of pre-emption, as tending to restrict the free sale and purchase of property is strictissimi juris, is lost unless claimed with promptitude, and is relinquished by any acquiescence in the original sale to be implied from the conduct of those claiming

(1) (1884) I. L. R. 10 Calc. 383. (2) (1870) 4 Beng. L. R. A. C. 203.

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to pre-empt. The right has always been kept by the Courts within narrow limits; it was a personal right not transmissible to heirs, and the Courts had always declined to extend it. Reference was made to Baillie, p. 489; Ameer Ali's Mahomedan Law, 3rd ed. vol. 1, p. 605-8; Sir R. Wilson's Mahomedan Law, pp. 331, 335, art. 379. The High Court was right in finding that the second ceremony had not been performed with the least practicable delay, and the Subordinate Judge has restricted his finding to there having been no unreasonable delay and no gross negligence: see *Jamilan* v. *Latif Hossein*. (1) It was further contended that the appellants, by taking the mortgage money out of Court, which was in reality the balance of the purchase-money, and by having made over possession to the purchaser, had acquiesced in the sale, and had relinquished their pre-emptive right: see *Habibunnissa* v. *Barket Ali* (2); Transfer of Property Act, 1882, ss. 82, 84.

De Gruyther replied.

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Jan. 24.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. These two consolidated appeals arise out of two suits, one brought by Mangni Ram, the other by Jowhuri Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in taluqa Rasulpur Bhatowni.

By conveyances dated January 28, 1891, and July 9, 1897, Mangni and Jowhuri had become the owners in equal shares of twelve annas of the property. The remaining four annas belonged to the respondent Anupbati Koeri, who on December 17, 1897, sold those four annas to Nirbhoy Chowdhry; and that is the sale against which the right of pre-emption is claimed. It has been found that Jowhuri first heard of the sale on December 20, 1897, and that thereupon he at once made the immediate claim to pre-empt which the law requires. Mangni first heard of the sale on January 5, 1898, and at once made his immediate claim. No question therefore arises with regard to the first claim by each of the two men. The principal controversy between the

(1) (1871) 8 Beng. L. R. 160; 16 S. W. R. F. B. 13.

(2) (1886) I. L. R. 8 Allah. 275.

parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhuri, on hearing of the sale, which he did at Monghyr, at once sent to his agent at or near Gogri to procure from the registry office a copy of the sale deed. The agent obtained that copy and sent it to Jowhuri, who actually received it on January 4. The High Court, differing from the Subordinate Judge, has found unreasonable delay at two points of these proceedings. It has held, first, that the copy from the registry was not obtained and sent off as soon as it might have been. But an examination of the official calendar shews clearly that the learned judges were led to this conclusion by a misapprehension as to the time during which the registry office was closed for the Christmas vacation. The High Court held, secondly, that Jowhuri was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the post office peon. This conclusion is based upon the evidence of the peon himself, which the learned judges believed. But the judge who had this witness before him disbelieved his story. That story is admittedly inconsistent with the rules of the post office; and it finds no support from the witness's own indorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting that story, and therefore the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it the position of Mangni and Jowhuri is identical. On January 5 they knew everything which it was essential to know. On that day they took the advice of a local barrister, and in accordance with his advice they on the next day, January 6, applied to the proper office for a police guard to protect the messengers and the money, which it was proposed those messengers should tender. This guard they obtained on January 7, and the messengers started. On that day those messengers made the claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land. The question that arises is whether

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the interval that elapsed between January 5 and January 7 is a fatal delay. The Subordinate Judge held that it was not; the High Court held that it was.

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned judges of the High Court for overruling the decision of the first Court, on a pure question of fact, were insufficient.

Another point argued on behalf of the respondents arises in this way: The two plaintiffs Mangni and Jowhuri had obtained a transfer of a zurpeshgi mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the mortgage money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; and after some hesitation the two plaintiffs took out that money. It was contended that by so doing they had recognized the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention. Until a decree for pre-emption was made Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre-empt.

There remains only one other point for consideration, as to which again the Courts in India have differed; and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference being Rs. 7,850. As to this point their Lordships do not find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid; and they are not prepared to dissent upon this point from the judgment of the High Court.

Their Lordships will humbly advise His Majesty that these

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appeals should be allowed; that the decrees of the High Court should be discharged with costs; that the decrees of the Court of the Subordinate Judge should be varied by directing the price of pre-emption to be calculated on the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such times as the High Court or the Subordinate Judge may determine; that, subject to these variations and the payment to the appellants of additional costs (if any), the decrees of the Subordinate Judge should be restored; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The respondents who have resisted the appeals will pay the costs thereof.

Solicitors for appellants: *Watkins & Lempriere.*

Solicitors for respondents: *A. H. Arnould & Son.*

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Nov. 6; *Dec.* 2.

FATIMA BIBI AND OTHERS . . . . . DEFENDANTS;

AND

SHEIKH AHMED BAKSH . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law — Marz-ul-maut — Apprehension of Death — Concurrent Findings of Fact.

Where the issue is raised as to the invalidity of a gift under the Mahomedan law of marz-ul-maut:—

Held, that the right test is whether the deed of gift was executed by the donor under apprehension of death. Concurrent findings of fact on such an issue will probably not be overruled even where the evidence is such as to justify either view.

APPEAL from a decree of the High Court (August 14, 1903), affirming a decree of the Subordinate Judge of Cuttack (August 20, 1900).

The respondent sued for declaration of title and recovery of

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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possession of the properties in suit, basing his claim on a deed of gift, dated May 21, 1897, executed by Moulvi Dadar Baksh in his favour. The appellants, his five sisters, contended that the deed was invalid with reference to the Mahomedan law regarding gifts made during marz-ul-maut, or death-illness. Both Courts upheld its validity as not having been executed during a death-illness, and decreed the suit. The evidence relating to the donor's illness at the date of the deed of gift, and his alleged apprehension of death, is thus dealt with by the High Court.

After referring to three text-books on the question, and the cases *Labbi Beebee* v. *Bibbun Beebee* (1) and *Muhammad Gukshere Khan* v. *Mariam Begam* (2), it recorded that there was no dispute that Dadar's health failed after he suffered from albuminuria, and that his illness was sufficient to entitle him to a medical certificate, but it considered that albuminuria did not constitute a death-illness in his case.

The judgment then gave a translation of a passage cited from the Fatawa-i-Shami, and proceeded: "The meaning of this passage is this, that if the illness increases and death then ensues, the increase is the death-illness; and both sides agree in this view. Now it is clear from the evidence on both sides that, although his symptoms improved on his return home, Dadar did have an increase of illness about ten days before the deed was executed; and the question arises whether that increase constituted a death-illness. To decide this we must apply the law as stated above regarding death-illness."

Having discussed the two different constructions by the parties of the passages cited from the text-books and cases mentioned above, the judgment continued:—

"For these reasons we agree with the remark made in *Hassarat Bibi* v. *Golam Jaffar* (3) that too narrow a view must not be taken of the doctrine of death-illness; and our view is in agreement with the way in which the doctrine is stated in that case, namely, 'was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender an apprehension of death?' and

(1) (1874) 6 N. W. P. H. C. R. p. 159.

(2) (1881) I. L. R. 3 Allah. p. 731.

(3) 3 C. W. N. 57.

'was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death?'

"We have thus to decide whether the increase in the illness which began about May 12 constituted a death-illness; and we must apply the foregoing principles to that increase. The principal question, then, is whether Dadar was under apprehension of death when he executed the hibanama. If he had marked physical incapacities at the time, they did not necessarily imply that he must have been under such apprehension, but they are matters to be considered in deciding the question.

"Now it is quite certain that each party has adjusted its evidence regarding that increase in his illness with reference to the above-mentioned rules of Mahomedan law. Thus the plaintiff's witnesses assert that the illness did not prevent Dadar from undertaking his necessary avocations, and the defendants' witnesses assert that he was absolutely confined to his bed and was very seriously ill. Hence each party's evidence cannot be trusted much regarding its own case. But statements which favour the opposite party may be relied on; and the best evidence is the prescription register, which was written up at the dispensary in the ordinary course of business, and is unimpeachable. That register, coupled with the deposition of Dr. Zorab, the civil surgeon, shews that Dadar was treated for fever on May 14. His illness became more serious on May 20, for Dr. Meadows, the civil surgeon, was called in and prescribed four medicines, a stomachic tonic, a febrifuge, a sedative and an antithirst draught. But Dr. Zorab said in his deposition, 'From the above prescription I think the doctor who was treating the patient could not have thought he was to die within a short time. There is nothing in the prescription to indicate he was in a critical state.' Dr. Meadows prescribed again on May 21, and only added an extra ingredient (a diaphoretic) to the stomachic tonic. He prescribed similar medicine on May 22 and 23. He was not called in again, and the nurse left about May 23, for Nural Huq, the principal witness on the defendants' side, says she stayed only three or four days. Dadar seems, therefore, to have

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improved under this treatment, and Dr. Bhusan, who visited him twice on May 26, prescribed only Mellin's Food and a sleeping draught in the evening. Next morning Dadar died. What the immediate cause of his death was is not known. No medical evidence about it has been given. Neither party has examined Dr. Keshab Chandra, who treated Dadar throughout the increase of illness till his death, nor Mrs. Anderson, the nurse. Dr. Meadows is dead. We have, therefore, only Dr. Bhusan's testimony. He visited rarely, and prescribed only on the evening of May 26; and he did not then think that Dadar would die shortly. He says he cannot say exactly what Dadar died of.

"All that is known then from the evidence is that Dadar got fever on May 12 and was much weakened by it, so that he had been most of his time reclining in the inner apartments upstairs for convenience. But there is no good evidence that he was incapable of standing up to say his prayers. The evidence on the defendants' side is highly exaggerated. The symptoms did not indicate that he must have been under apprehension of death. There was nothing in the medicines prescribed to shew that he was in a critical condition, and there is no reason to suppose that Dr. Meadows in prescribing for him and in engaging a nurse had any further idea than that the fever required and would yield to careful treatment. There is no reason, then, to suppose that Dr. Meadows or any one else could have told Dadar he was in a critical state on the 21st. The albuminuria had become chronic and required rest and change. Fever is a common ailment. There was nothing, therefore, in his symptoms which should necessarily have excited in him apprehension of death. Moreover, no hurry was shewn in getting the deed registered. There was nothing, therefore, to indicate that Dadar was under apprehension of death on May 21; hence the increase of illness did not constitute a death-illness. We accordingly find that the hibanama is valid."

Jardine, K.C., and *Ross*, for the appellants, contended that the deed of gift was invalid as having been executed by the donor during death-illness. To prove a death-illness it was not

necessary to establish that the donor had apprehension of death at the time he executed the deed. Proof of this apprehension would not prove the actual existence of death-illness. It isthe increase of the original illness, terminating in death, which is the decisive test in this case. Even if apprehension of death had to be proved, it can only be as an inference from surrounding circumstances, and follows necessarily from the evidence given in this case of increase of illness before the execution of the deed, with its fatal result. All the surroundings must be considered, and it was contended that the Courts had taken an erroneous view of the rule of Mahomedan law of evidence, and had disregarded the important circumstance that death had resulted in only six days from the date of the deed, from the proved aggravation of illness on the part of the donor. Reference was made to Baillie's Digest, 2nd ed. (1875), ch. 8, p. 552 ; Ameer Ali's Mahomedan Law, vol. 1, pp. 51, 53 ; and to an article in the *Calcutta Law Journal*, vol. 1, No. 12, p. 131—note Appendix C, which gives a full translation of the passage shortly given in Baillie's Digest, as quoted from the Doorr-ul-Mookhtar, p. 246.

De Gruyther, for the respondent Ahmed Baksh, relied on concurrent findings of fact as to the state of the patient and consequent validity of his deed of gift. The right test was applied, namely, Was he under apprehension of death at its date? Both Courts found he was not under such apprehension, and it has not been shewn by the appellant that they were clearly wrong in so finding, or that their findings were highly improbable having regard to all the circumstances. Reference was made to *Sarabai* v. *Rabiabai* (1) ; *Rashid Karmalli* v. *Sherbanoo*. (2)

Jardine, K.C., replied.

The judgment of their Lordships was delivered by

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Dec. 2.

LORD COLLINS. The question in this case is whether a certain deed of gift made by one Moulvi Dadar Baksh, deceased, in favour of his son Sheikh Ahmed Baksh is invalid by reason of the Mahomedan law of marz-ul-maut relating to gifts made in death-illness. The deed was executed on May 21, 1897, and on the

(1) (1905) I. L. R. 30 Bomb. 537, 551.

(2) (1907) I. L. R. 31 Bomb. 264

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27th of the same month Moulvi Dadar Baksh, the donor, died. A great number of objections to the deed were urged by the appellants (the defendants) before the Subordinate Judge, all of which were considered in great detail and overruled by him in a most elaborate judgment in favour of the respondents. That judgment was affirmed on appeal by the High Court at Fort William, and it is the concurrent judgments of these two tribunals that this Board is now called upon to overrule. The only point which the appellants have argued on this occasion was that which no doubt goes to the root of the matter, namely, whether the gift was invalid under the law of marz-ul-maut. The test which was treated as decisive of this point in both Courts was, Was the deed of gift executed by Dadar Baksh under apprehension of death? This, which appears to their Lordships to be the right question, is essentially one of fact, and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, and it would probably be enough to prevent this Board from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability. Their Lordships are, however, clearly of opinion that the reasons given both by the Subordinate Judge and by the High Court, which they will not repeat, establish a large preponderance of probability in favour of the conclusion at which they both arrived.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed.

The appellants will pay the costs of the first respondent, who alone defended the appeal.

Solicitor for appellants : *G. C. Farr.*
Solicitor for respondent : *W. W. Box.*

RAJA PRAMADA NATH ROY . . . . . PLAINTIFF; J. C.*

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RAJA RAMANI KANTA ROY AND OTHERS . DEFENDANTS. *Nov.* 6, 7; *Dec.* 11.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Bengal Tenancy Act, ss. 65, 159 *and* 188—*Agreement amongst Co-sharers to sue separately for Rent—Right to sue for the whole Rent—Sale of Tenure.*

Shareholders in a zemindari may, either by express or implied agreement, establish the right to separate payment of their shares of rent, with the consequent right to sue separately. But such agreement does not preclude the zemindars from obtaining a decree under the Bengal Tenancy Act for the rent as a whole with a view to sale of the tenure, or any one of them from doing so by making his co-sharers defendants.

APPEAL from a decree of the High Court (June 3, 1904), affirming a decree of the Subordinate Judge of Rajshahye (December 17, 1900).

The main question decided was whether the appellant, as one of the co-sharers in the zemindari interest in an estate known as Dihi Haloti, is entitled to sue for the whole rent due from the putnidars of the said estate, making his co-sharers in the zemindari interest parties to the suit as defendants.

In the year 1837 one Raja Ram Chundra Bahadur was the sole owner of a separate eight-anna share in the said estate. On April 23, 1837, he made a putni settlement of his eight-anna share with one C. I. Abbott on a yearly rental of Rs. 6,349.6.10. Both the zemindari and the putni interest changed hands. In the year 1900 the zemindari interest was held as follows: The appellant, six annas; respondents 14 and 15, one anna; respondents 2, 3 and 16, one anna.

The putni interest was held by the remaining respondents, and also by respondent No. 16, by purchase.

To the respondent zemindars the putnidars paid nearly the whole of the proportion of the rent they were entitled to. To the appellant they paid no rent at all. He gave notice to the other zemindars asking them to join him in a suit for the arrears of rent due, and on their failure to do so he sued,

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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making all the putnidars and the co-sharer zemindars defendants thereto. The plaint recited the above facts, and claimed a decree for the whole rent due on the putni, amounting to over Rs. 27,000. The purpose in thus framing the suit was to enable the appellant to bring to sale the putni tenure itself in default of payment.

The written statement of respondents 1 and 4 contained the following defence, which alone is material: "As the respective predecessors of the plaintiff and of the pro forma defendants brought separate suits for arrears of rent, and acquired decrees on account of their respective shares, and also amicably realized the same by separately granting dakhilas in respect of the putni described in the plaint, the suit for arrears of rent brought by the plaintiff in its present form cannot proceed."

The Subordinate Judge decreed in favour of the appellant for his share of the arrears of rent due, saying: "It appears from the decrees put in evidence by the defendants that the collection of the plaintiff's share is separate. This separated collection therefore gives rise to the presumption that by some arrangement which has been consented to by the co-sharers and the tenants, separate payment of a particular share of the rent has hitherto been made to the plaintiff. That being so, so long as the arrangement continues, the plaintiff is not competent to sue for the whole rent, even though the co-sharers are made parties to the suit."

The High Court upheld this view by a majority, Geidt J., the dissentient judge, being of opinion that the appellant was entitled to a decree in a suit properly framed for the whole rent due as the only method by which he could enforce the statutory right conferred by the Bengal Tenancy Act of bringing the tenure itself to sale for the recovery of the arrears of rent due therefor.

J.R. Atkin, K.C., and *De Gruyther*, for the appellant, contended that the appellant was entitled to sue for the whole rent due on the tenure with a view to bring it to sale under the Bengal Tenancy Act (VIII. of 1885). Sect. 188 gives that power to the landlords collectively, and it followed that, if they did not agree so to act, the appellant could by the ordinary rule of civil

procedure exercise the right, making the dissentient co-owners defendants. No agreement, express or implied, had been proved whereby the appellant had deprived himself of his ordinary rights under his kabulyat or his statutory rights under the Bengal Tenancy Act. And the separate collection of their shares of rent by the co-owners does not bar them, or any one of them, from suing in such a manner as will enable him to sell the tenure. Reference was made to s. 65, ss. 159 et seq., and s. 188; Bengal Act (VIII. of 1869), ss. 22, 29 and 64; Act XI. of 1859, ss. 6, 10 and 13; Bengal Act (VII. of 1868), s. 11; *Guni Mahomed* v. *Moran* (1); *Jiban Krishna Roy* v. *Brojo Lal Sen.* (2)

C. W. Arathoon, for the first respondent, the purchaser of an interest in the putni tenure, and for the Moitra respondents who were owners of a one-anna share of the zemindari interest, one of them being also a purchaser of an interest in the putni tenure, contended that an agreement had been come to between the zemindars and putnidars under which the shares of putni rent should be separately paid to the co-sharers in the zemindari. The evidence shewed that an agreement to that effect had been come to and had been consistently acted upon, each co-sharer having, so far as he had received his rent, been paid separately. There had been created separate rights on the one side, separate liabilities on the other. That operated to deprive the collective owners of the right which they would otherwise have had of obtaining a decree for the rent as a whole. If they could not collectively sue for a decree to that effect, it followed that one could not sue therefor by making his co-owners defendants; and see on this point s. 188. Accordingly the remedy of bringing the tenure to sale in that way was lost. So long as the agreement lasted the appellant was bound by it and was precluded from bringing this suit. He referred to the sections already cited of the Bengal Tenancy Act; *Rajnarain Mitter* v. *Ekadasi Bag* (3); *Beni Madhub Roy* v. *Jaod Ali Sircar* (4); *Gopalchunder Das* v. *Umesh Narain Chowdhry.*(5)

Atkin, K.C., replied.

(1) (1878) I. L. R. 4 Calc. 96.
(2) (1903) L. R. 30 Ind. Ap. 81.
(3) (1899) I. L. R. 27 Calc. 479, 483.
(4) (1890) I. L. R. 17 Calc. 390.
(5) (1890) I. L. R. 17 Calc. 695, 697.

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Dec. 11.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This appeal raises a question upon the construction and effect of the Bengal Tenancy Act, a short question, but one which may be of considerable importance wherever that Act applies.

The facts of the case are not in dispute, and are simple. In the year 1837 the then owner of the zemindari interest in an eight-anna share in Dihi Haloti created a putni tenure in those eight annas in favour of one Abbott at a rent reserved. The zemindari and the putni interests both underwent subsequent devolutions, and at the time which is now material the present plaintiff (appellant) held six annas of the zemindari interest, respondents 14 and 15 held one anna, and respondents 2, 3 and 16 one anna. The putni interest was held by the remaining respondents, and also by respondent 16. The last mentioned, therefore, was interested both in the zemindari and in the putni. The putni rent fell into arrear so far as the share which should have come to the appellant was concerned.

The appellant thereupon brought the present suit on April 17, 1900, in the Court of the Subordinate Judge of Rajshahye. He made the putnidars defendants, and he joined as co-defendants his co-sharers in the zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. But the plaint asked in the alternative for a decree for the plaintiff's share of the rent.

The Subordinate Judge refused to make a decree under the Bengal Tenancy Act for the whole putni rent, and gave a decree only for the plaintiff's share of the rent. On appeal the case came before two judges of the High Court, Ghose and Geidt JJ., who differed in opinion, Ghose J. holding that the view of the Subordinate Judge was correct, Geidt J. being of the contrary opinion. In consequence of this difference the case was referred to a third judge, Brett J., who agreed with Ghose J., with the result that the appeal was dismissed. Against that decision the present appeal has been brought, and it lies upon their Lordships to determine which of the views taken by the learned judges ought to prevail.

Sect. 65 of the Bengal Tenancy Act enacts that, "Where a tenant is a permanent tenure holder . . . . he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

Sect. 159 and the following sections provide the means and procedure for so bringing the tenure to sale, and for the cancellation of incumbrances thereupon. The only other section which it is necessary to refer to is s. 188, which says that, "Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them."

By the express terms of the Bengal Tenancy Act, in the event of rent being unpaid, the owners of the zemindari interest are entitled, by suit under that Act, to bring a putni to sale, with the consequences prescribed by the Act. And it is a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants, and sue for the whole rent of the tenure. This must apparently be the law applicable to the present case, unless there be something to exclude the case from the operation of these general rules.

For the purpose of this exclusion, what was relied on was this : it was said that, by express or implied agreement between the zemindars and the putnidars, the shares in the putni rent of the several zemindars were to be paid, and so far as they were paid at all were, in fact, paid, separately ; and it was contended that that agreement, on the one hand, entitled the separate zemindars to sue for their separate shares, and to bring to sale the right, title, and interest of the putnidars, but, on the other hand, either precluded the zemindars altogether from obtaining a decree under the Bengal Tenancy Act for the rent as a whole, or at any rate prevented one of the zemindars from doing so by making his co-sharers defendants.

This was the contention which prevailed with the Subordinate

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Judge and with two out of the three judges in the High Court.

The evidence of the alleged agreement consisted of certain decrees, which seemed to shew that the shares of the rent had been from time to time separately recovered. It has long been held in Bengal that agreement, either expressly proved or implied by the conduct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate shareholders; and their Lordships have no inclination to question that course of rulings.

But it has been equally clearly laid down in Bengal that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding; and their Lordships that this is clearly a sound view of the law. And it appears to their Lordships to be sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that the right to bring the tenure to sale for arrears of rent remains intact, and also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs.

It only remains to notice s. 188, cited above. It was suggested in argument that this section precludes a suit under the Act, for the aggregate rent of the tenure, unless all those entitled to share in the rent join as plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorized to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law.

Their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decrees of both Courts in India should be discharged, and that instead thereof it ought to be declared that the appellant is competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit; that the case ought to be remitted to the High Court to take the necessary steps for the disposal thereof on the footing of the above declaration; and that the respondents

who defended the appeal to the High Court ought to pay the costs thereof, and that the costs in the Court of the Subordinate Judge ought to be dealt with by that judge on the above footing.

The respondents who defended this appeal will pay the costs of it.

Solicitors for appellant : *Downer & Johnson.*

Solicitors for some respondents : *T. L. Wilson & Co.*

PESTONJI JIVANJI AND OTHERS . . . . . PLAINTIFFS.

AND

SHAPURJI EDULJI CHINOY AND OTHERS . DEFENDANTS.

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Nov. 18, 19, 20.
1908
Feb. 12.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, HYDERABAD ASSIGNED DISTRICTS.

Title to Land in Secunderabad Cantonment—Grant of Land by an Officer of Hyderabad State—Grant of permissive User thereof by Military Authority —Possession.

Upon an issue of title to the lands in suit, situated in the Secunderabad cantonment, the plaintiffs relied—(1.) on a document issued in 1838 by an officer of the Hyderabad State expressing that the State had assented to the grant thereof to their predecessors with possession; (2.) on a document obtained by them and issued in the next year by the authority of the brigadier commanding the Hyderabad subsidiary force, which had its headquarters in the said cantonment, giving permission to use the land. The defendants contended that the second document was the real root of title, and that by its terms the Parsi community generally, and not the plaintiffs' predecessors, were the grantees :—

Held, overruling the appellate Court, that the lands had been effectively granted by the State to the plaintiffs' predecessors; that the officer commanding the troops had no power to grant title, but, in the exercise of his discretion as to the convenient occupation of the cantonment, gave permission to use the lands in a particular manner; that the evidence shewed that for many years succeeding the grant the plaintiffs' predecessors had undisputed possession and control of the said lands.

APPEAL from a decree of the Court of the Judicial Commissioner of Hyderabad Assigned Districts (December 12, 1901), reversing a

* *Present* : LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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decree of the Superintendent Residency Bazar, Hyderabad (March 25, 1901).

The principal question decided was as to the title to a plot of land on which stands a Parsi "tower of silence," situate in the south-eastern corner of the cantonment limits of Secunderabad.

In 1837 two brothers, Viccaji Meherji and Pestonji Meherji, were carrying on a business at Hyderabad, and determined to reside there permanently. In order that they and their family might have a proper place of burial, together with the due observance of religious ceremonies, they made arrangements with the Parsi high priest at Poona to send Parsi priests to Hyderabad, who were to be the paid servants of the brothers, with liberty to add to their salaries by the receipt of fees for services performed for other members of the Parsi community resident in the neighbourhood. When these arrangements were completed an application was made to the Nizam's Government for the grant of a plot of land on which to erect a temple and tower of silence, or "dukhma". This application was granted, and, though no grant in terms was produced in evidence, an order reciting the application and the sanction of the Nizam's Government thereto, and directing the delivery of possession of the land granted to the two brothers, was produced, dated June, 1838, and is set out in their Lordships' judgment.

Before proceeding to erect buildings on the said land, as it was to be used as a place for the disposal of the dead and was situate close to the cantonments at Secunderabad, the permission of the general commanding at that place was obtained by an order made on January 15, 1839, also hereinafter set out.

The brothers then enclosed the lands, and built a tower of silence for depositing their dead. Up to 1861 the descendants of the brothers maintained the buildings on the lands, and at their own expense performed all ceremonies and kept priests for the purpose as paid servants. They allowed other Parsis to use the tower of silence, and to subscribe for the purposes connected therewith, but no claim was made in derogation of their ownership.

In the year 1895 the tower was found insufficient for the needs of the Parsi community, and some of the defendants began to

build a new tower to supplement the old one. The foundations of this new tower are stated by the Judicial Commissioner, after inspection of them, to be outside the wall surrounding the old tower and its appurtenances, but close by and on the same hill.

The plaintiffs, who are descendants of the builders of the old tower, objected to the construction of the new tower, and on December 19, 1895, filed their plaint. It alleged a title to the land in suit derived by inheritance from the brothers, and the trespass by the commencement of building operations. It prayed for a perpetual injunction restraining the defendants from "encroaching upon" the said land, and an order directing the removal of the building material brought on the said land, with a restoration of the land to its original condition.

The contesting defendants denied the title as alleged, and contended that a grant of the land was made to the Parsi community in general, and further asserted that if the title at any time was in the brothers, they had in October, 1839, dedicated the property in suit, since which time the Parsi community in general had been in possession and enjoyment of the same.

The Court then took proceedings under s. 30 of the Civil Procedure Code, so as to bring the whole Parsi community on the record as defendants, and on November 12 ninety-nine Parsis filed a written statement confessing judgment, and disclaiming the defence already taken.

The Superintendent decided that a grant of the land in suit was made to the brothers personally, and not to the Parsi community, and that there never had been any dedication of the property so as to constitute the Parsi community owners thereof, or the brothers trustees for them. The action of the defendants was therefore wholly unjustifiable, and he accordingly made a decree granting the plaintiffs the reliefs claimed by them, with costs.

The Judicial Commissioner, in reversing this judgment, agreed with the Court below that there had been no dedication by the brothers to the Parsi community, but disagreed with him as to the effect of the document in 1838, called exhibit L. In reference thereto he said: "But in my opinion the main weakness

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of exhibit L is that it does not, even if fully admitted in evidence, prove plaintiffs' contention that their two ancestors were granted the hill to be their own exclusive property. Exhibit L is a description at third hand of the grant, and does not give, and cannot be held to give, an exact description of the exact terms of the grant. It simply recites that the hill was granted to Pestonji and Viccaji, but it does not give such a detailed account of the grant as would enable any one to know the exact terms of the grant, namely, whether the grant was made to these two gentlemen personally, or on their application to them for the use of the whole Parsi community."

He further decided, after an examination of the documentary and oral evidence on the record, upon which the plaintiffs relied, that it failed to shew that they were at any time exclusive owners of the hill.

He concluded: "Finally, I am bound to say that when the plaintiffs do not know so much about their title as to be able to say whether it is oral or documentary, it seems strange that they should profess to know so much about it as to be able to say that the title was given to them personally and not for the benefit of the Parsi community. To sum up, I find that the plaintiffs have failed to prove any grant, oral or documentary, by which they acquired an exclusive title over the hill in dispute, and I also find that they have failed to support such alleged title by conclusive proof of exclusive possession, and still more they have failed to prove that they have acquired any title by exclusive possession."

Jardine, K.C., and *De Gruyther*, for the appellants, contended that on the evidence it was proved that the title to the lands in suit had been vested in the two brothers, Viccaji Meherji and Pestonji Meherji, for their own benefit absolutely. There was a concurrent finding that they did not at any time dedicate it so as to constitute the Parsi community owners thereof or themselves trustees for that community. It was not alleged that the grant in the first instance to the two brothers was made to them as trustees, and the Parsi community had not proved any grant to them.

Ross, for the respondents, contended that the appellate Court was right in finding that the appellants had not proved any grant of an exclusive title to them of the property in suit. They did not even know whether their alleged grant was oral or documentary, but relied on a recital in somewhat vague terms contained in the document of 1838 of a Government sanction to a grant before that date, the terms of which were not specified and, as the evidence shewed, were not known. That is insufficient to dispose of the issue which has arisen, whether the grant was to the brothers personally or for the benefit of the Parsi community. The appellants failed to shew that they had acquired title by proof of exclusive possession, or that the respondents were excluded from all rights in the property so as not even to be able to build a new tower of silence thereon without the appellants' consent. There had been sufficient user of the land and expenditure thereon by the respondents to disprove the appellants' exclusive claim.

Jardine, K.C., replied.

The judgment of their Lordships was delivered by

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SIR ARTHUR WILSON. The controversy out of which this appeal arises lies between various member of the Parsi community, and relates to certain land situated in the Secunderabad cantonment, on a portion of which stands a Parsi tower of silence.

In or about the year 1895 the respondents, purporting to act on behalf of the Parsi community, resolved to erect on the land in question a second tower of silence in addition to that already there. The appellants objected to this proceeding, claiming as descendants and representatives in title of the original founders.

Negotiations for a settlement having failed, the appellants filed the present suit. They alleged that the founders were in their lifetime the owners of the land in question, and that the property had devolved upon themselves, and they proceeded to complain of the respondents' encroachment.

The respondents, who were the defendants in the suit, asserted that the land had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of that community generally for all time, by the cantonment authority.

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In the Courts in India the defendants further set up that, if the grant had been to the founders, the latter had subsequently dedicated the land to the purposes of the Parsi community generally. It was also contended that a title, good against the founders and their representatives, had been acquired by adverse possession. On both those points the Courts in India found against the defendants, and their Lordships have not been asked to review those findings. The sole question discussed on the argument of the appeal was that of the original title to the property.

The judge who tried the case decided in favour of the plaintiffs now appellants, and granted an injunction. On appeal the Judicial Commissioner reversed that decision and dismissed the suit. Hence the present appeal.

The founders, already mentioned, were two brothers, Parsis, Pestonji Meherji and Viccaji Meherji, who in 1837 and afterwards carried on business as bankers at Hyderabad and in other places. It appears from the correspondence that at about that time they had made up their minds to make Hyderabad their home and they determined at the same time to establish a tower of silence, for which purpose it was necessary both to obtain the ground on which the tower could be built and to establish the necessary priests for carrying on the services and ceremonies required by the Parsi religion.

It is clear that with regard to the establishment of priests everything was done by the brothers Pestonji and Viccaji. They found the proper persons, and arranged with them to come and settle at the spot to be selected. They undertook the responsibility for their salaries, though the priests were to be at liberty to receive fees for the performance of ceremonials from other Parsis.

Pestonji and Viccaji also, through their agent at Secunderabad, made all the necessary arrangements for obtaining the site required. It is not necessary to examine all the contemporary papers in evidence. The most important document relied upon by the plaintiffs is the following :—

" Ijat asar (1) Balkishta Reddy, mucaddum of the village of Bholuckpore, in the district of Hoosain Saugar, may you be well,

(1) These words are left untranslated in the exhibit : the original is in Telugu.

year 1248 Sal i.e. Fasli. The reason of writing this is that the bankers Pestonji and Viccaji having applied and Government having sanctioned the grant to them of the hill which is near Gattula Naganna Kunta in the Devini Bhavi Kancha within the boundary of the said village, for depositing bones, the Taluqdar Raja Rang Rao Bahadur has sent order and therefore it is hereby written that you deliver up the said hill to the said bankers Pestonji and Viccaji. Note that this is peremptory order in this matter. The date the 25th Rabiul-awal 1254 (i.e. June, 1838).

"IBRAHIM KHAN, Naid (in Persian),
Peith Mashirabad."

This document was held by the judge who tried the case to be a genuine document, a finding for which he assigned cogent reasons. The learned judge who heard the case on appeal pointed out a variety of circumstances which he thought threw suspicion upon the document. But he did not overrule the finding of the first Court that it was genuine. Their Lordships see no sufficient reason why they should reject that finding.

The next document of high importance is the following :—

"This is to certify that the Parsis of Secunderabad have permission by order of Brigadier Wahab, C.B., commanding Hyderabad Subsidiary Force to enclose the hill by name Nomavunghutt for a burying place, the circumference of which is about (18) eighteen hundred feet, and immediately adjoining the south end of Nawganah's garden and near the public bearer's line in rear of the cantonment of Secunderabad.

"This hill is given for a tower only to be built on its summit.

"H. F. F. CONSIDINE,
Assistant Q.M.-General,
Hyderabad Subsidiary Force.

"Assistant Q.M.-General's Office,
Head-quarters Hyderabad
Subsidiary Force."

"Secunderabad, 15th January, 1839."

That document was actually obtained on behalf of the two brothers through their agent, but it is the matter upon which

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the respondents chiefly rest their case. Their contention is that that document formed the real root of title to the land in question, and that by its terms the grant was one to the Parsi community generally, and not to the two brothers personally.

Before examining these two documents and their relation one to the other, it is well to consider the authority from which each document issued, and the relation of those authorities one to the other. The first of the two documents clearly was issued by an officer of the Hyderabad State, and it purports to express a transaction, by which the State had assented to the grant of the land to the two brothers, and directed possession of it to be delivered to them. The second document purports to be issued by the authority of the brigadier commanding the Hyderabad subsidiary force, a force which had its headquarters in the Secunderabad cantonment.

The establishment of the subsidiary force, and its modifications from time to time, may be collected from Aitchison's Treaties, vol. 8, at and after p. 264, and from the various treaties and agreements which follow. It was a force in the employment of the East India Company, and commanded by the company's officers, but maintained, by agreement, in Hyderabad territory for the protection of the Nizam.

The research of counsel was unable to discover any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the military commander on the other, with respect to the management, control, and disposition of the cantonment and the land comprised in it. And it appears clear that no such treaty ever was in existence.

When the Nizam's Government admitted a British force within its territory, and allotted to it the Secunderabad cantonment as its headquarters, it no doubt by necessary implication conveyed to the military authorities all powers of jurisdiction, control, and management incident to maintaining the efficiency and the discipline of the troops and the peace and good order and convenient use of the cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate in perpetuity land forming part of the cantonment, and undoubtedly Hyderabad

territory, for a purpose wholly unconnected with military requirements. These considerations must be borne in mind in estimating the effect of the two documents which have been cited.

There appears to be no real difficulty in reconciling the two documents and appreciating their effect. The first, emanating from the State, purports to deal with and enforce a grant of the land by the State to the two founders by name, and the delivery of possession to them. The second document, emanating from the cantonment authorities, does not deal with title or possession, but gives permission to use the land already conveyed for the particular purpose of a tower of silence and to enclose the land. These are matters obviously within the discretion of the commanding officer, for they might affect the convenient occupation of the cantonment. The effect of the two documents is to shew a good title in the founders, and not in the Parsi community.

What happened afterwards only confirms this view. The founders admittedly enclosed the land, and erected a tower of silence upon it, at their own expense. About the same time, or shortly afterwards, they erected a fire temple upon land which they acquired by private purchase, and endowed it.

The evidence as to the possession, management, and control of the tower of silence, and of the land on which it stood, shews these to have been in the founders. The only question being who were the original grantees, the events of the early years after the acquisition of the land and the erection of the tower are much more important than those of later years, when the circumstances of the parties had somewhat changed. And in those early years we find, from the correspondence, that the priests referred such difficulties or questions as arose for the orders of the founders and obeyed those orders.

The founders certainly down to the year 1863 bore the whole expense of the establishment and all costs of maintenance and repair. During those years the Parsi community were not represented by any committee or other organization. Therefore during those years the founders had no rivals in respect of possession and control; for the suggested possession and authority of the head priest is negatived by his own letters to the founders.

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After 1863 the Parsi community from time to time subscribed money in aid of additions and improvements, and from 1882 onwards there was a committee representing, in some sense, the community. But what happened in these later years can throw but little light upon the nature of the grant of, or soon after, 1837.

Their Lordships are of opinion that the view of the case taken by the judge who tried it was correct. They will humbly advise His Majesty that the decree of the Judicial Commissioner should be discharged with costs, and that of the Court of the Superintendent restored. The respondents will pay the costs of this appeal.

Solicitors for appellants: *Payne & Lattey.*

Solicitors for respondents: *Lattey & Hart.*

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Feb 4;
March 18.

HANSRAJ AND OTHERS . . . . . APPELLANTS;

AND

SUNDAR LAL AND ANOTHER . . . . . RESPONDENTS.

HANSRAJ AND OTHERS . . . . . APPELLANTS;

AND

DWARKA DAS AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Arbitration Award—Decree of District Judge in accordance therewith—Dismissal of Appeal by the Chief Court as incompetent upheld.

A joint Hindu family was engaged in business with branches in different parts of the country. In 1886 a suit was brought in the Court of the Political Agent at Sahore, in Bhopal, for partition of so much of its joint property as was within his jurisdiction. In 1888 another suit for partition was brought in the Court of the District Judge of Karnal, in the Punjab.

After protracted litigation an arbitrator was appointed in the Punjab suit to determine what joint property, movable and immovable, except

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* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

the immovable property outside British India, was to be partitioned. The District Judge of Delhi, to whose Court the suit had been transferred, passed a decree in accordance with the arbitrator's award after disposing of various objections filed thereto, and the Chief Court of the Punjab dismissed an appeal therefrom as incompetent as it did not appear that the decree was in excess of or not in accordance with the award.

The Political Agent in Bhopal also decreed in accordance with the award, and his judgment was confirmed in appeal by the Agent to the Governor-General :—

Held, that the Chief Court rightly affirmed the decree of the District Judge.

APPEAL from a decree of the Chief Court of the Punjab (June 27, 1902), affirming a decree of the District Judge of Delhi (April 9, 1901).

Appeal by special leave from a decree of the Court of the Political Agent to the Governor-General in Central India (November 17, 1902), affirming a decree made by the Court of the Political Agent at Sehore, September 4, 1901. The special leave was granted with liberty to the Secretary of State for India in Council to intervene upon the question whether His Majesty in Council should entertain an appeal in the suit on account of the authority from which the appeal is brought, being one from which such an appeal should not be admitted.

The suits related to the estate of one Beni Pershad, deceased. He and his two brothers, Dwarka Das and Seth Jhandamal, were for some time previous to 1886 members of a Hindu joint family carrying on a mercantile business at Sehore, a British Cantonment in the territories of the Begum of Bhopal, and also at other places in Bhopal and the Punjab.

On July 13, 1886, the respondent Dwarka Das instituted a suit for partition of the joint estate, other than that situate in the district of Karnal, in the Court of the Political Agent, Bhopal. The defendants to the suit were Beni Pershad and Jhandamal. In that suit the Political Agent made his decree on September 4, 1901.

While it was pending Jhandamal on August 14, 1888, instituted another suit in the Court of the District Judge of Karnal against the appellants (representatives of Beni Pershad, deceased) and Dwarka Das for the partition of the whole of the joint estate, movable and immovable, situate not only in the

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Karnal district, but in the other places already mentioned. This suit was subsequently transferred to the Court of the District Judge of Delhi.

The appellants pleaded that they were ready and willing to partition all that constituted the joint estate, but that the suit was barred in consequence of a reference to arbitration, and also in consequence of the pending suit in the Court of the Political Agent, Bhopal.

On October 11, 1889, the District Judge of Delhi decided that the Political Agent at Bhopal had no civil jurisdiction, and on June 25, 1890, he struck out the appellants' defence for failing to produce all the books of account filed in the Court at Sehore. On August 7, 1890, he made a decree ex parte in favour of the plaintiff ; but on April 23, 1892, it was set aside by the Chief Court of the Punjab and the case remanded for re-trial.

The plaintiff then amended his plaint, and the appellants in a written statement reiterated their previous defence, and also challenged the jurisdiction of the Delhi Court to partition properties situate out of British India.

On February 13, 1893, the District Judge decided that he had no jurisdiction in regard to property, movable or immovable, situate outside British India. This order was subsequently reversed in review by another District Judge in regard to the movable property.

Various other proceedings followed, and on May 11, 1896, the Chief Court again remanded the case, and thereupon on August 28, 1897, the following agreement of reference to arbitration executed by the parties was placed before the Court :—

"We, the parties to this case, have, with our mutual consent, nominated Mr. S. Clifford, Divisional Judge, Delhi, as sole arbitrator to decide the matters in dispute in this suit. As has been already agreed upon between us, with our mutual consent, the arbitrator should, out of the joint capital, award Rs. 95,000 to Seth Haus Raj, Amar Singh, and Mussammat Khemi, defendants, and Rs. 25,000 to Seth Dwarka Das, defendant, over and above their shares, and should determine what joint property, movable and immovable, of every description, except the immovable property outside British India, is to be partitioned between

the parties; and he should divide the same among the parties according to their respective shares, and award each party his proper share. It has also been agreed that all the account books will not be brought here (Delhi) from Sehore. But if the arbitrator thinks proper to examine any of the bahis, it will be produced before him. We, the parties, shall act upon and abide by the award to be filed by the said arbitrator in this case. It is therefore prayed that the case may be referred to the above-named arbitrator."

A formal order of reference was made by the Court, and on November 7, 1898, a revised order of reference was made on the ground that the prior order was not quite in terms of the agreement.

The award was dated May 25, 1900. Various objections were taken thereto by the appellants, mainly attacking the revised order of reference as illegal. On June 15 the District Judge remitted the award in order that an omission with regard to payment of certain interest should be rectified and the award rendered complete. The completed award was dated June 20, 1900, and on April 9, 1901, the District Judge dismissed all the objections and gave judgment according to the award.

The appellants filed an appeal in the Chief Court, and in the alternative prayed for revision under s. 622 of the Code of Civil Procedure. On June 27, 1902, the Chief Court decided that it had no jurisdiction to interfere either on appeal or by way of revision, and made a decree in accordance with the judgment.

The judgment of the Chief Court, delivered by Judge A. S. Reid, was as follows: "This appeal has been referred to a Full Bench by the learned Chief Judge for determination whether any action can be taken on the appellate or revisional side of this Court having regard to the recent ruling of their Lordships of the Privy Council in *Ghulam Jilani* v. *Muhammad Hassan*, L.R. 29 Ind. Ap. 51." After referring briefly to the proceedings which led to the award, it continued:—

"Objections attributing misconduct and a faulty method of arriving at conclusions to the arbitrator, were filed by the defendants-appellants, and were disposed of by the District Judge of

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Delhi, who passed a decree in accordance with the award. From this decree this appeal has been filed, and the appellants have prayed that the memorandum of appeal be treated as an application for revision, if it be held that an appeal does not lie.

"The objections now taken, that the appellants submitted to arbitration under pressure, apparently from this Court and from Mr. Clifford, that they 'unwillingly agreed' to the appointment of Mr. Clifford and that the submission to arbitration was bad, were not taken below and cannot, in my opinion, be taken, here.

"The object of taking these objections is to set aside the award, and to allow them to be taken for the first time at this stage would be, as remarked by their Lordships in the case above cited, to defeat the provisions of art. 158, Sched. II., of the Limitation Act.

"It is therefore unnecessary, for the purposes of this appeal, to decide whether an appeal lies on the ground that there was no submission to arbitration. It is sufficient to hold that the objection cannot be considered in this appeal. Their Lordships' ruling, above cited, is authority for holding that an appeal does not lie on the objections taken below.

"In 74, Punjab Record (Full Bench), 1894, concurred in by their Lordships, Plowden, senior judge, said : 'As it is clear that in the appeal before us, it is not alleged that the decree is not in accordance with the award delivered by the arbitrators to the Court, or that the decree is appealed against as being in excess of the award, I think our answer to the question must be that the appeal is prohibited by s. 522 of the Code of 1882.'

"Much stress has been laid on the objection that the Punjab Courts had not jurisdiction and that the reference to arbitration was therefore void.

"The arbitrator was seised of the whole matter in dispute between the parties, except so much as was specifically excluded, and, as remarked by their Lordships of the Privy Council, in the case above cited, the question whether the suit was competent was one of the issues in the suit, and as such, referred to the arbitrators. The fact that the issue as to

competence was framed and decided by the Court below, before the final remand, does not affect the arbitrator's competence to decide it as one of the issues between the parties, and, as remarked by their Lordships, the arbitrator was not bound to give an award on each point.

"Counsel for the appellant cited *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1), as authority for the proposition that an appeal lies from a decree in accordance with an award, delivered after the date fixed. Their Lordships decided that case entirely on the construction of ss. 508, 514 and 521 of the Code of Civil Procedure, and held that the words in s. 521, 'No award shall be valid unless made within the time allowed by the Court,' would be rendered inoperative if s. 508 were treated as merely directory and not as mandatory and imperative. Their Lordships held that there was no award on which a decree could be based and that they were bound to take judicial notice of the words in the statute although the objection had not been raised below.

"This case is clearly distinguishable from that before us, in which there was an award and a decree in accordance with it, and the only objections taken within the period allowed were those above set out. Their Lordships' later ruling is clear, and the Code contains no mandatory provision as to reference similar to that as to the award being made within the period allowed. The appellants could have objected that there had been no reference to arbitration, and their failure to do so does not entitle them to appeal on that ground. The order of November 7, 1898, referring the suit to arbitration provided that the costs should 'abide the result of the finding of the arbitrator.' It has not been shewn that the decree for costs is not in accordance with the award, and I have no hesitation in holding that the appellants were largely responsible for the delay in the proceedings.

"For these reasons the appeal should, in my opinion, be dismissed with costs.

"On the question of revision the ruling of their Lordships in the Privy Council is conclusive. The reasons above stated for

(1) (1891) L. R. 18 Ind. Ap. 55 ; S. C. I. L. R. 13 Allah. 300.

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holding that the objection on the ground that there was no reference to arbitration cannot be entertained at this stage in appeal apply equally to the application, for revision, and the finding that there was a reference to arbitration, an award and a decree in accordance with that award, to passing which the Court below had no alternative, the application to set saide the award having been refused precludes revision. The Court below has not exercised a discretion not vested in it by law, or failed to exercise the discretion so vested, or acted in the exercise of its jurisdiction, illegally or with material irregularity. The application for revision therefore fails."

In the Central India suit, and on May 14, 1901, Dwarka Das applied to the Political Agent at Sehore for a decree to be made at Sehore in accordance with the said award of Mr. Clifford, and on September 4, 1901, he made a decree accordingly.

On November 18, 1901, the appellants appealed, to the Court of the agent to the Governor-General in Central India, and on November 17, 1902, that Court dismissed the appeal, and on July 11, 1903, refused leave to appeal to His Majesty in Council.

De Gruyther and *H. Mitra*, for the appellants in both appeals contended, as regards the first appeal, that the Chief Court of the punjab had jurisdiction to grant the appellants relief either by appeal or by revision. The Civil Procedure Code, in prohibiting an appeal from a decree made in accordance with an award, assumed that the award itself was valid and binding and legal. It did not preclude an investigation into the question of its legality merely because a decree had been passed in accordance with it. Here the referring Court had no jurisdiction as to the property outside British India. It had itself so decided on February 13, 1893, and the review of that decision by another judge who reversed it as regards movables was incompetent. The Court, therefore, had no jurisdiction to refer, and accordingly the arbitrator had no jurisdiction to decide. Moreover, there was misconduct on the part of the arbitrator. The submission provided "that all the account books will not be brought here (Delhi) from Sehore. But if the arbitrator thinks proper to examine any of the bahis it will be produced before him."

From their number and bulk it was impossible to produce them. He nevertheless ordered their production, and on the appellants failing to produce them on May 21, 1900, he made his award on the 25th, and in doing so drew inferences against the appellants from the absence of the books. Reference was made to Civil Procedure Code, ss. 518, 521, 522 and 624 : *Mothooranath Tewaree* v. *Brindabun Tewaree* (1) ; *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (2) ; *Rameshchandra Dhar* v. *Karunamoyi Dutt* (3) ; *Najmuddin Ahmad* v. *Puech* (4) ; *Venkayya* v. *Venkatappaya.* (5) The case was not governed by *Ghulam Jilani* v. *Muhammad Hassan.* (6)

In the Central India suit it was contended that the award was invalid and could not affect property outside the jurisdiction of the referring Court. Neither the reference nor the award operated as regards the property within the jurisdiction of the Sehore Court. The Political Agent had no jurisdiction to decide a suit pending in his Court based on this award without any inquiry or trial by himself. Nor could he make a decree based on this award before it had been finally decided to be a valid award.

Cowell, for the respondents in both cases, contended, as regards the first appeal, that the Chief Court had rightly held that the appeal thereto was incompetent both under s. 522 of the Code and in accordance with the judgment in *Ghulam Jilani* v. *Muhammad Hassan.* (6) The section and the judgment were conclusive. With regard to the second appeal, the appellants were concluded by their agreement to abide by the award. They for years acquiesced in the Sehore Court's proceedings, awaiting the result of the decision of the Punjab Courts, which had the same parties and the same issues before them. They never raised any objection to that course being adopted, and the decision of the Political Agent and the Governor-General's Agent to dispose of the Sehore suit in accordance with the award cannot be now impugned, and should be upheld for the reasons there given.

(1 (1870) 14 Suth. W. R. 327.
(2) (1897) I. L. R. 25 Calc. 141.
(3) (1906) I. L. R. 33 Calc. 498.
(4) (1907) I. L. R. 29 Allah. 584.
(5) (1891) I. L. R. 15 Madr. 348.
(6) (1901) L. R. 29 Ind. Ap. 51.

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Cohen, K.C., and *Ross*, for the Secretary of State in the second appeal, while not conceding that the appeal lay, or that any special leave to appeal should have been given, the appeal from a political jurisdiction being to the Secretary of State, said that the Political Agent in Bhopal, in such a case as the present, would be guided by the decision of the Punjab Chief Court if affirmed.

De Gruyther replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The parties to these two appeals or their predecessors in title have been in litigation now for more than twenty years. The subject of litigation is the property of a joint Hindu family engaged in business, with branches in different parts of the country. Part of the family property is situated in British India; part in native States. The litigation was begun in 1886, in the Court of the Political Agent at Sehore, in Bhopal, by a suit for partition of so much of the family property as was within his jurisdiction. The next proceeding was a suit for partition, commenced in 1888, in the Court of the District Judge of Karnal, in the Punjab.

In August, 1897, after prolonged litigation, the parties to the Punjab suit nominated Mr. S. Clifford, Divisional Judge of Delhi, sole arbitrator to decide the matters in dispute in the suit. The arbitrator was to determine what joint property, movable and immovable, except the immovable property outside British India, was to be partitioned between the parties. The appointment of Mr. Clifford was duly confirmed by the Court.

The arbitrator finally submitted his award on June 29, 1900.

The appellants filed a great number of objections to the award. These objections were considered and disposed of by the District Judge of Delhi, who passed a decree in accordance with the award.

The objections filed by the appellants were all more or less frivolous. In some the arbitrator was charged with misconduct, but, on the face of the objections, it is perfectly clear that there was no misconduct within the meaning of that expression in the

chapter on arbitration in the Civil Procedure Code, nor anything that could justify the Court in setting aside or remitting the award.

From the decree of the District Judge the appellants appealed to the Chief Court of the Punjab.

The Chief Court dismissed the appeal on the ground that the appeal was incompetent, inasmuch as it did not appear that the decree was in excess of, or not in accordance with, the award.

In the meantime the Political Agent in Bhopal had made a decree in accordance with Mr. Clifford's award. There was an appeal to the Court of the Agent to the Governor-General in Central India, but the appeal was dismissed. Special leave to appeal against the order of the Agent to the Governor-General was granted by this Board on the representation that there was or might be an important question as to the jurisdiction of the Court of the Political Agent; and liberty was reserved to the Secretary of State for India in Council to intervene in his official capacity. Mr. Cohen, who appeared for the Secretary of State, not admitting that an appeal would lie to His Majesty in Council from the order of the Agent to the Governor-General in India, intimated that the Court of the Political Agent in Bhopal would be guided by the decision of the Chief Court of the Punjab if His Majesty thought fit to affirm that decision.

In their Lordships' opinion the decision of the Chief Court is perfectly right. Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed.

The appellants will pay the costs of the appeals other than the costs of the intervenant.

Solicitors for appellants : *Rubinstein, Myers & Co.*

Solicitors for respondents : *T. L. Wilson & Co.*

Solicitor for the Secretary of State : *Solicitor, India Office.*

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T. P. PETHERPERMAL CHETTY . . . . APPELLANT;

AND

R. MUNIANDI SERVAI AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Benami Transaction—Fraudulent Attempt defeated—Decree for Restoration against Benamidar—Benami Deed a Nullity—Limitation Act, art. 91.

In a suit in 1901 to recover land from the appellant it appeared that the plaintiff's predecessor in title had in 1895 collusively executed a benami deed of sale thereof to the defendant's predecessor in order to defeat the claim of a prior equitable mortgagee who at once sued the parties to the said benami deed and obtained satisfaction of his claim with costs :—

Held, that, the purpose of the fraudulent conveyance having been defeated, the plaintiff was entitled to a decree and the defendant could not rely upon the contemplated fraud as an answer to the action.

Held, also, that the deed of sale being benami was inoperative and did not require to be set aside. Consequently art. 144, and not art. 91, in the Second Schedule to the Limitation Act applied.

APPEAL from a decree of the Chief Court of Burma (February 2, 1905) affirming a decree of the District Court of Hanthawaddy (March 7, 1904). In 1888 and 1889 the land in suit vested in one Muniandi Maistri and was by him subjected to an equitable mortgage by deposit of its title deeds with a money-lender who on November 28, 1891, assigned his equity to Arunachellam Chetty. Muniandi Maistri died on October 3, 1890, and eventually Chellum Servai and Muniandi Servai became his heirs, the former obtaining in 1894 letters of administration to his estate.

On June 11, 1895, Chellum Servai executed to one Petherpermal Chetty, the predecessor of the appellant, the deed of sale of the said land which gave rise to this suit. On September 18, in the same year Arunachellam, the equitable mortgagee, sued to establish his lien and obtained a decree on the finding that on June 11, 1895, Petherpermal Chetty had full notice of the prior equitable mortgage. The result of the action

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

was that Petherpermal Chetty paid off the claim of the equitable mortgagee with costs.

Chellum Servai died in June, 1896, before the decree was finally confirmed on appeal, and thereupon Muniandi Servai, the respondent, became entitled to the land in suit, and sued on July 24, 1901, to recover the same from Petherpermal Chetty, who set up an absolute title under the deed of June, 1895.

The main issue in the case was whether the said deed was benami, and, if so, whether the plaintiff was entitled to question its validity as an operative sale.

Both Courts found that the deed was not a real transaction, that the respondent was not precluded from asserting his legal rights, and that his suit was not barred by limitation.

Upjohn, K.C., and *Bailhache*, for the appellant, contended, after referring to the evidence as to the benami character of the transaction, that the plaintiff was not entitled, if it was proved or admitted that his predecessor had participated in a fraudulent attempt to cheat his creditor, to set aside his predecessor's conveyance and recover the property with which he had parted. Reference was made to *Taylor* v. *Bowers* (1); *Kearley* v. *Thomson* (2); Mayne's Hindu Law, 6th ed. s. 441, 7th ed. p. 588; *Govinda Kuar* v. *Lala Kishun Prosad* (3); *Shamlall Mitra* v. *Amarendronath Bose*. (4) Before he could recover the land he must first set aside the conveyance, and a suit for that purpose was barred by Act XV. of 1877, Sched. II., art. 91, the period being calculated from the date of the plaintiff's becoming aware in 1896 of the fraud.

De Gruyther, for the first respondent, was not heard.

The judgment of their Lordships was delivered by

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LORD ATKINSON. In this case an action was originally brought by R. Muniandi Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandi Maistri, against T. P. Petherpermal Chetty, the uncle and predecessor of the appellant (hereinafter called Petherpermal the elder), and two formal defendants, R. M. A. R. L.

(1) (1876) 1 Q. B. D. 291.
(2) (1890) 24 Q. B. D. 742.
(3) (1900) I. L. R. 28 Calc. 370.
(4) (1895) I. L. R. 23 Calc. 460.

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Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy District, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568.12.

On June 11, 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On September 18, 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandi Maistri, deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568.12 with interest, and other relief.

Petherpermal the elder filed his defence, and, the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of June 11, 1895, was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On July 30, 1897, R. Muniandi Servai and Petherpermal the elder executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandi Servai, given in evidence in this case, that the deed of June 11, 1895, was executed in order to enable the rent to be collected and paid to the grantors, and " to quash Subramanian's case," i.e., the case of the equitable mortgagee. The District Judge held that it was " a benami conveyance" made by the parties to it " in collusion to defeat " the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the judge who tried the case and saw the witnesses, approved, as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions, therefore, for their Lordships' decision are :

1. Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed ?

2. Is his right of action barred by the 91st article of Schedule II. to the Indian Limitation Act ?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

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A benami conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th ed. p. 595, para. 446) the result of the authorities on the subject of benami transactions is correctly stated thus: "446. . . . . Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested. The fact that A. has assumed the name of B. in order to cheat X. can be no reason whatever why a Court should assist or permit B. to cheat A. But if A. requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A. has actually cheated X. or not. If he has done so by means of his alias, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B., whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away . . . . . where they had intended to defraud creditors, who, in fact, were never injured. . . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, 'In pari delicto potior est conditio possidentis.' The Court will help neither party. 'Let the estate lie where it falls."

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law if the maxim 'In pari delicto potior est conditio possidentis' were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put every one, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it; and, despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (1) and the authorities upon which that decision is based clearly establish this. *Symes* v. *Hughes* (2) and *In re Great Berlin Steamboat Co.* (3) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry L. J. in *Kearley* v. *Thomson.* (4)

Mr. Upjohn contended that where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

(1) 1 Q. B. D. 291.
(2) (1870) L. R. 9 Eq. 475, at p. 479.
(3) (1884) 26 Ch. D. 616.
(4) 24 Q. B. D. 742.

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As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of June 11, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in the Second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Solicitors for appellant : *A. H. Arnould & Son.*

Solicitors for first respondent : *Sanderson, Adkin, Lee & Eddis.*

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DALIP SINGH AND OTHERS . . . . . APPELLANTS;

AND

CHAUDHRAIN NAWAL KUNWAR AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Discussion of Evidence—Conflicting Findings—Issue as to benami Character of a Mortgage.

Held on the evidence, that the judgment of the High Court must be upheld, which reversed a finding of the Subordinate Judge that the mortgage sued upon was a benami, and not a genuine, transaction When the evidence on neither side of such an issue is wholly convincing, and when the evidence given and withheld is open to adverse criticism, a Court must rely largely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct. It is a very

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**Present* : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

material circumstance that as a genuine transaction it was advantageous to the mortgagor, and as a benami transaction it afforded to him no present protection from creditors.

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DALIP SINGH v. CHAUDHRAIN NAWAL KUNWAR.

APPEAL from a decree of the High Court (November 17, 1902), reversing a decree of the Subordinate Judge of Meerut (December 23, 1899).

The question decided was one of fact on which the Courts below had differed, whether the deed of mortgage referred to in their Lordships' judgment as executed on January 10, 1889, by Chaudhri Partab Singh and his two sons in favour of the respondent Nawal Kunwar was a genuine or fictitious transaction.

The suit was brought in 1898 by Nawal Kunwar to enforce her mortgage. The Subordinate Judge dismissed it, finding that no consideration had passed and that the mortgage was fictitious.

The High Court reversed this finding and decreed the suit.

Jardine, K.C., and *Ross*, for appellants.

De Gruyther, K.C., and *Cowell*, for respondents.

The judgment of their Lordships was delivered by

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April 2.

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court at Allahabad, bearing date November 17, 1902, which reversed those of the Subordinate Judge of Meerut, dated December 23, 1899. The substantial question as to which the Courts in India have differed, and which their Lordships have to decide, is whether a certain deed of mortgage, bearing date January 10, 1889, represents a genuine transaction or a fictitious one.

The mortgagors were one Chaudhri Partab Singh and his two sons, one of whom was then a minor. The subject-matter of the mortgage was land and houses at Meerut. At the time of the mortgage Partab was indebted to several persons, partly on mortgages and partly on other securities, the principal creditors being one Munna Lal, the heirs of one Shibban Lal, and one Kishan Sahai, and it is clear that at that time Partab was in money difficulties.

The mortgage in controversy purports to be in favour of a lady named Nawal Kunwar, for Rs. 10,000. Nawal Kunwar was at

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that time residing in Partab's house, and she was the sister of his son-in-law.

The transaction of January 10, 1889, as it appears on the face of the papers, consisted of two parts. First, there was the mortgage now disputed, executed by Partab and his two sons in favour of Nawal Kunwar, according to which the lady, as consideration for the mortgage, was to discharge Partab's debts already referred to, a small previous bond in her own favour, and the costs of the transaction, and to pay over Rs. 1,000 to Partab.

The second part of the transaction purports to be a sub-mortgage by the lady to Munna Lal, who has been already mentioned as a creditor of Partab. It was for Rs. 5,000, out of which Munna Lal was to deduct the amount of his previous claim against Partab and to pay the balance in cash.

Subsequently, on July 18, 1896, Partab being dead, his sons sold the mortgaged property to Jainti Pershad, the son of Munna Lal, who was also dead, and on January 18, 1898, Jainti Pershad sold a portion of the property to one Dalip Singh.

On September 24, 1898, Nawal Kunwar instituted the present suit in the Court of the Subordinate Judge of Meerut. She joined as defendants 1 and 2, the sons of Partab; 3 and 4, the sons of Munna Lal; 5, the heir of Shibban Lal; and 6, Dalip, the purchaser of a portion already mentioned. The object of the suit was to enforce payment of the plaintiff's claim under her mortgage of January 10, 1889, by the sale of the mortgaged property. It is clear, therefore, that the parties substantially interested in the contest were, on the one hand, Nawal Kunwar, and on the other hand, the sons and heirs of Munna Lal, and, in a lesser degree, Dalip.

The plaintiff's case at the trial was that the mortgage to her was a perfectly genuine mortgage, and that she paid the greater part of the consideration (the precise amount is immaterial here) partly out of her own moneys and partly by means of the Rs. 5,000 borrowed by her from Munna Lal under the sub-mortgage of the same date. The case on the other side was that the mortgage to Nawal Kunwar was a fictitious transaction, and that the only real transaction on that occasion was a borrowing

by Partab of Rs. 5,000 from Munna Lal, the name of the lady being introduced purely benami.

The Subordinate Judge found for the defendants, holding the alleged mortgage to her to be benami. On appeal the High Court differed from that finding, held the transaction to have been genuine, and gave a decree in the plaintiff's favour.

Their Lordships are of opinion that the decision of the High Court was right. There was some evidence on each side bearing directly on the character of the transaction, but on neither side was that evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence that was called is open to much adverse criticism. The testimony of one witness is described by the judge who heard it as being worthless. In determining, therefore, which story is to be accepted, it has been found necessary in India, and it is equally necessary for their Lordships, to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct.

As their Lordships agree in the conclusion arrived at by the High Court, and substantially in the reasons for that conclusion, it is unnecessary to examine the evidence in detail, but it may be well briefly to indicate the principal considerations which seem to their Lordships to support the case of the plaintiff.

The deed itself contains nothing suspicious. Its recitals shew with substantial accuracy Partab's previous indebtedness, and the provisions of the deed are such as one expects to find in a deed embodying a real transaction.

The plaintiff, though a woman residing in Partab's house, was not, in the ordinary sense of the term, a dependent member of his family. She was a person of some independent means, was in the habit of lending money, and lent it to Partab himself not on this occasion only. On the other hand, Partab was in embarrassed circumstances. Only five days after the mortgage in question he was pressed for payment of Government revenue, and had to borrow Rs. 300 from the plaintiff to pay it. Partab's motive in the disputed transaction must have been to relieve his difficulties, but if regarded as a benami transaction, the

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mortgage, which was for considerably less than the value of the property, would have afforded no present protection against creditors. It was suggested that by the accumulation of interest, at a penal rate, the deed might in time become a protection, but that is a somewhat remote speculation. If regarded as a genuine transaction, the advantages to Partab of what was done are obvious. He secured a diminution in the rate of interest which he had to pay, he obtained the benefit of one consolidated liability in place of a number, and he secured a friendly creditor.

At subsequent dates Partab and his sons, and those claiming through them, always acknowledged the genuineness of the transaction. Particularly in the conveyance by Partab's sons to Jainti Pershad the mortgage is so recognized. It is true that in that deed it is said that the mortgage had been satisfied, but that is a very different thing from there having been no mortgage at all.

One point of minor importance was raised on the appeal. The High Court, by their decree, whilst giving the plaintiff the right to recover on her mortgage, allowed, as against her, whatever amount not exceeding Rs. 10,000 might be due under the sub-mortgage to Munna Lal. It was contended that the limitation to Rs. 10,000 was wrong. Their Lordships are of opinion that the limitation was right. That sum was agreed upon on the occasion of the sale by Partab's heirs to Jainti Pershad, and the matter was dealt with on that footing by the substantial defendants in their written statement.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Ranken Ford, Ford & Chester.*

DEBENDRA NATH DUTT . . . . . DEFENDANT;

AND

ADMINISTRATOR-GENERAL OF BENGAL . PLAINTIFF.

J. C.*
1908
May 12;
June 3.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Administration Bond—Letters of Administration void for Fraud—Sureties responsible so long as Letters are unrevoked.

In a suit upon a bond conditioned for the due administration of an estate it was pleaded by the sureties that the letters of administration having been annulled by the Court on the ground of fraud must be regarded as a nullity from the beginning, and that the bond was, so far as the sureties were concerned, void and of no effect:—

Held, that the decree against them must be upheld. So long as the letters were unrevoked the administrator represented the deceased, and the sureties were responsible for his acts and defaults.

APPEAL from a decree of the High Court (March 23, 1906) affirming a decree of Sale J. (March 29, 1905) in favour of the respondent for Rs. 1,07,159, with interest, against the appellant and one Banku Behary Bannerjee. The respondent sued under the circumstances stated in the judgment of their Lordships to recover the value of eighty-six and a half Bank of Bengal shares from three defendants—Cowie, to whom letters of administration to the estate of Edmund Craster Craster, the deceased owner of the shares, had been granted, and the appellant and the said Banku Behary Bannerjee, who were sureties in a bond conditioned for due administration by Cowie.

It appeared that Craster died in 1898 leaving a will of which probate was granted in England to two executors. He left three sons (no one of them being named Henry Craster Craster) and two daughters. In 1902 Cowie applied to the High Court for the grant to himself of letters of administration of the estate of the deceased as the attorney of an alleged Henry Craster Craster, and in such petition falsely stated that the deceased had died intestate and had left the said Henry Craster Craster his only

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son and next of kin him surviving. The petition was supported by a false declaration and affidavit by Cowie, and had annexed thereto a power of attorney whereby the alleged Henry Craster Craster purported to empower Cowie to make the application.

Cowie sold the shares and converted them to his own use. The sureties pleaded that, the grant of letters of administration having been obtained by misrepresentation and fraud, and therefore being void, the bond was likewise void and unenforceable, both as itself induced and obtained by fraud and also as entered into under a mutual mistake as to the circumstances and the subject-matter of the contract, and also as founded on a misrepresentation made to the appellant by the Court, namely, that the said Henry Craster Craster really existed and was the only son and next of kin of the deceased, and that these facts had been well proved to the Court.

The High Court in appeal (Harington and Stephen JJ. dissenting) found that there had been no mutual mistake of fact essential to the agreement, and held that, although the grant of the said letters of administration was obtained by fraud and was void ab initio, the said bond was not void, and had not been rendered void by the existence of a will made by the said Edmund Craster Craster; also that the granting of letters of administration by the Court to the said Cowie did not amount to any representation whatever by the Court; that the eighty-six and a half shares in the Bank of Bengal having been lost to the estate, and the proceeds having been received and misappropriated by Cowie, the sureties were liable to pay the amount; and that the position of the sureties had not been altered to their prejudice by the delay of the executors of the deceased in informing them of the fraud, and consequently they were not discharged by such delay.

The material portion of the judgment of Harington J., one of the dissentient judges, is as follows :—

"I am unable to agree that the sureties are liable under the contract on which they are sued. I think no liability under that contract ever attached to them: because both they and the Court were under a mistake of fact essential to the agreement, and that fact was the authority of Cowie as attorney of the

next of kin to apply for, and receive, a grant of letters of administration.

"Under s. 214 of the Succession Act the Court has power to make a grant to the attorney of the person entitled to administration, and to no other person. If therefore Cowie had not succeeded in deceiving the Court as to the existence of Henry Craster Craster, and in misleading the Court into the belief that he was duly authorized by Henry Craster Craster to apply for letters of administration, the order of the Court of July 29, 1902, granting letters of administration to Cowie as the duly constituted attorney of Henry Craster Craster, the next of kin of the deceased, could never have been made, and similarly the bond could never have been taken by the Court.

"Suppose the Court had been made aware, after the order of July 29, 1902, and before the execution of the bond on August 15, that Cowie was not the attorney of the next of kin, and was not a person to whom a grant of letters of administration could be committed under s. 214, the Court could not have taken the bond under s. 256, nor could the Court have permitted the letters granted under the order of July 29, 1902, to issue from the office.

"The fraud therefore practised by Cowie induced in the Court a mistake as to a fact which was essential to the agreement, because, but for that mistake, the Court would neither have granted letters of administration to Cowie, nor have taken a bond from the appellants.

"Then the fact of Cowie's authority was equally essential to the agreement from the point of view of the appellants.

"It appears on the evidence that the draft petition, setting out Cowie's title to letters of administration, was shewn to the appellants before they executed the bond, and they were informed, truly enough, that the Court had granted the petition.

"Both the appellants say that they would not have executed the bond, if they had not believed that Cowie was the duly appointed attorney of the next of kin. I believe the appellants when they say this—and I have no doubt that, while they were prepared to guarantee the due performance of the duties of administrator by a person authorized for that purpose by the

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person beneficially entitled to the deceased's estate, that they were not prepared to give such a guarantee in the case of a person not so authorized.

"Both parties to the bond were equally deceived by Cowie, and they were deceived in a matter essential to the transaction. The Court believed it was making a grant to a person legally entitled to claim it; the appellants believed that they were guaranteeing the honest administration of the estate by a person legally entitled to letters of administration. Had it not been for the mistake as to Cowie's authority, the Court could not have taken, and the appellants would not have given, the bond under which it is sought to make them liable.

"In my opinion, on these facts, the case falls within the scope of s. 20 of the Contract Act, and the agreement by which the appellants undertook to be bound to the Court, in a penal sum conditioned for the due administration of the estate of Edmund Craster Craster deceased by Ernest Hardwicke Cowie, one of the constituted attorneys of Henry Craster Craster, is void, because both parties to the agreement were under a mistake as to a matter of fact essential to the agreement.

"In effect, the Court agrees to issue letters of administration under s. 214 of the Succession Act to the attorney of the next of kin, if the attorney of the next of kin will engage with two sureties for the due administration of the estate, and accordingly the sureties engage that the attorney of the next of kin shall duly administer the estate. Both parties contract on the basis that the person to whom administration is committed is the person duly authorized by the next of kin to represent him, and neither party would contract if the administrator did not fill that position.

"The sureties did not guarantee the truth of the allegations made in the petition of Cowie as to his authority to apply for letters of administration. Both the Court and the surety accepted the truth of these statements, and contracted on the assumption that they were true.

"The question whether the appellants are estopped by their own deed from alleging that Cowie was not one of the duly constituted attorneys of the next of kin has not been argued.

I do not think it could successfully be contended that they are estopped by a statement made by their co-contractor as to a matter of fact peculiarly within his knowledge, unless it be shewn that they have been guilty of some negligence. Here they satisfied themselves that the Court had granted the petition on the evidence which had been tendered by Cowie. I do not think they were bound to inquire further—or that they were guilty of negligence in executing a bond containing this statement."

After distinguishing the cases of *Lester* v. *Gooch* (1) and *Mayor, &c., of Kingston-upon-Hull* v. *Harding* (2), the learned judge proceeded :—

"It has been contended in argument that the same reasoning would apply if the letters were recalled on the subsequent discovery of a will—the existence of which was unknown at the time the application for letters of administration was made. It is said that in that case the grant would have been made, the bond accepted by the Court, and executed by the sureties equally under a mistake in point of fact essential to the agreement. The contract of suretyship would therefore be void, and the sureties would be discharged from their liability to make good any misappropriation of the deceased's estate by the grantee of letters of administration prior to the probate of the will.

"I do not feel pressed by this argument for two reasons : First, I do not think a contract is void on the ground of common mistake if the parties to the contract contemplate the possibility of the mistake and agree as to what is to be done if there is such a mistake. It is hardly correct perhaps to call it a mistake when it is a contingency contemplated by the parties with a provision in the contract as to what is to be done if such a contingency happens. The sureties engage in their bond that if a will is discovered and probate be granted thereof, the administrator shall render up and deliver the letters of administration to him granted in Court. It would involve an absurdity to say that the contract was void ab initio and the sureties were discharged because of the existence of a will, when the contract

(1) (1868) 17 W. R. 139.

(2) [1892] 2 Q. B. 494.

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contains a stipulation by which the sureties agree as to what is to be done if a will is discovered and proved.

"Secondly, the existence of a will unknown at the time letters are applied for in no way affects the risk the sureties take upon themselves, and therefore a mistake as to the existence of a will is not a matter of fact essential to the agreement into which the sureties enter. The sureties agree to warrant due administration by a person duly authorized by the next of kin to represent him. This risk they undertake is not affected by the existence of a will unknown to any of the parties. The sureties do not undertake the heavier risk of warranting due administration by a person not so authorized. A common mistake therefore as to the authority of the person guaranteed is a mistake on a matter of fact essential to the agreement, because it directly affects the risk undertaken by the sureties. The risk of guaranteeing a person authorized by the beneficiary might be small: the risk of guaranteeing a person not so authorized would be much greater, as a beneficiary may be expected, in his own interests, to choose an honest man to administer the estate. But the risk of guaranteeing the person in whom the beneficiary had confidence would in no way be increased or lessened by the existence of a will unknown to the person guaranteed.

"In my opinion to hold the sureties liable is to impose on them a liability which they never agreed to undertake; I think therefore that the appeal should be allowed and the suit dismissed."

Lord R. Cecil, *K.C.*, and *Boydell Houghton*, for the appellant, contended that the administration bond was entered into on the basis that Cowie was, as stated on the face of the bond and believed both by the obligee and by the sureties, the administrator of Craster's estate. It was proved that the letters of administration were void, and the bond therefore was also void. Both the appellant as surety and the obligee were under a mistake of fact essential to the bond, and accordingly the bond is void under s. 20 of the Indian Contract Act, 1872. That mistake of fact was as to Cowie's authority as attorney of the next of kin to apply for and receive a grant of letters of administration. The Court by granting those letters held Cowie out to the sureties as

the duly authorized attorney of the next of kin, the person entitled to letters, and the duly appointed administrator. The appellant relied on that representation, and executed the bond on that basis. Besides, by the due construction of the bond the sureties only warrant the due administration by a person who is actually authorized as administrator, and do not warrant due administration by a person not so authorized. They referred to the reasons given by Harington J., and to *Ellis* v. *Ellis* (1), *Kepp* v. *Wiggett* (2), and *Holland* v. *Lea.* (3)

Simon, K.C., and *Sargant*, for the respondents, contended that the majority of the High Court were right in their decision. Cowie broke the condition of the bond by failing in due administration, and accordingly his sureties were liable. Mistake or fraud by Cowie in inducing them to execute the bond, even if it afforded good ground for setting the bond aside as between themselves and Cowie, does not affect the transaction as between the sureties and the Court or the persons entitled to the protection of the bond, and does not entitle the sureties to set it aside as against them. The grant of letters was made on the strength of the bond, not the bond on the strength of the grant, and in reliance on any implied representation effected by the grant. Even if the grant was void ab initio, the administration de facto took place and the sureties were responsible. Reference was made to s. 242 of the Indian Succession Act, and to *Lester* v. *Gooch.* (4)

Lord Robert Cecil, K.C., replied.

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June 3.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the High Court of Judicature at Fort William in Bengal.

The appellant Debendra Nath Dutt was one of two sureties in a bond conditioned for the due administration by Ernest Hardwicke Cowie, a solicitor in Calcutta, of the estate of a retired Indian civil servant named Craster. Mr. Craster died in England in August, 1898, leaving a will which was duly proved here in the following month of October. Part of the deceased's

(1) [1905] 1 Ch. 613.
(2) (1850) 10 C. B. 35.
(3) (1854) 9 Ex. 430, 439.
(4) 17 W. R. 139.

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estate consisted of shares in the Bank of Bengal and other Indian assets. The Indian assets escaped the notice of the executors and remained unclaimed and outstanding. On July 29, 1902, Cowie, who is stated in the printed cases to have been one of the solicitors to the Government, and who certainly was then in good credit, obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and sole next of kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on August 15, 1902, on the production of a bond in the usual form executed by Cowie and the two sureties, who received a small payment for their services but were not themselves parties to the fraud or cognizant of it. By these means Cowie obtained possession of the bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was not discovered till the end of 1903 or the beginning of 1904. Cowie then absconded. He was apprehended, tried, and convicted. The grant of administration in his favour was cancelled, and in May, 1904, letters of administration with a copy of the will annexed were granted to the Administrator-General of Bengal. The bond of August 15, 1902, was then assigned to the Administrator-General, and he brought this suit against Cowie and Cowie's sureties. Cowie made no defence. The suit was heard by Sale J. That learned judge pronounced a decree in favour of the Administrator-General, the result of which, so far as regards the sureties, was that they were ordered to pay to the administrator a sum equal to the amount of the proceeds of the bank shares misappropriated by Cowie, together with interest and costs. Both the sureties appealed to the High Court. But that Court in its appellate jurisdiction by a majority affirmed the order of Sale J. and dismissed the appeal with costs.

The case of the appellant Dutt, who alone has appealed to His Majesty, as presented to this Board, was that the letters of administration granted to Cowie, having been annulled by the Court on the ground of fraud, must be regarded as a mere nullity from the beginning; that Cowie, therefore, never was administrator, and that the bond, so far as the sureties were concerned, was void and of no effect; for the sureties undertook to be

responsible for a real administrator, not for a person assuming to act in a capacity which he never possessed and which the Court could not have conferred upon him. The case was argued very ably by the learned counsel for the appellant, who said everything that could be said on his behalf. But there is really no substance in the appellant's contention. So long as the letters of administration granted to Cowie remained unrevoked, Cowie, although a rogue and an impostor, was to all intents and purposes administrator. He, and he alone, represented the deceased in India. His receipts were valid discharges for all moneys received by him as administrator. As administrator he collected the assets belonging to the deceased in India, and he misappropriated the assets which he so collected. For his acts and defaults as administrator the appellant and his co-surety became and must remain responsible.

Their Lordships are therefore of opinion that Maclean C. J. and the learned judges who concurred with him were perfectly right, and they will humbly advise His Majesty that the appeal must be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Vallance & Vallance.*

Solicitors for respondent: *Wade & Lyall.*

J. C.* 1908

Feb. 5, 11; *May* 14.

RADHA PROSAD MULLICK AND ANOTHER. APPELLANTS;

AND

RANIMONI DASSI AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Will—Construction according to Hindu Law—Gift to Daughters and their respective Sons not an Absolute Gift—Gift of Women's Estates, remainder to Sons excluding Female Issue.

A Hindu will should be construed relatively to the ordinary notions and wishes of Hindus respecting the devolution of property.

Mahomed Shumsool v. *Shewukram*, (1874) L. R. 2 Ind. Ap. 7, followed.

A Hindu by his will directed his executors on the failure ab initio of a prior bequest to an adopted son "to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons, share and share alike":—

Held (overruling the Courts below), that the daughters were not "each entitled to a moiety of the estate of the testator absolutely"; but that the clear intention of the testator was that the daughters should each take an ordinary woman's estate (with a right of survivorship between them), the remainder being limited to their sons to the exclusion of female issue.

APPEAL from a decree of the High Court (April 23, 1906) affirming a decree of Woodroffe J. (July 31, 1905).

The questions decided relate to the legal construction of the will of Hurry Dass Dutt, deceased, who died on October 30, 1875. The will was dated on the day of his death and appointed his widow, father, and uncle his executors and trustees.

Inter alia the will contained the following provisions:—

"Whereas having no son born to me of my body I am desirous of adopting one in my lifetime but in case I depart this life before carrying such my desire into effect I hereby authorize and empower my wife and executrix Srimutty Surnomoni Dassi

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and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son and in case of his death during his minority or on attaining his full age and without leaving male issue to adopt a second son and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son and no more. In any of the above cases of adoption should the adopted son die leaving a son or sons the power of adoption shall cease or remain in abeyance during the life or lives time of such son or sons of such adopted son but shall revive on the death of such son or sons during minority.

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family idol Sri Sri Radha Gobindji and to pay my wife monthly during her natural life for her sole and separate use the sum of rupees two hundred and also the sum of rupees fifty monthly to such adopted son who shall live and attain his full age of eighteen years after his so attaining such age of eighteen years during the lifetime of my said wife provided he remains under her control and bears a good character and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour and for the purposes of such monthly expenditure my executrix executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government securities in their joint names but in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife after which event I direct my said executors and trustees to make over the whole of my estate and effects both real and personal or immovable or movable whatsoever and wherescever and of what nature or quality soever to such adopted son who shall survive my wife if he shall have attained his age of eighteen years during the lifetime of my wife or on his so attaining such age after her decease to whom and his heirs I give devise and bequeath the same.

"But in case none of such adopted sons survive my said wife

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or in case of either surviving my said wife and dying under the said age without leaving a son or sons I desire and direct my executors after the death of my said wife or the death of such son after her but under such age of eighteen years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike."

The testator left a widow, two daughters, Ranimoni and Premmoni, and three sons of the latter. In pursuance of the will the widow on August 9, 1876, adopted Jyoti Prosad Mullick, who died on January 29, 1881. She then adopted Amrita Lall Dutt on February 9, 1881, after the death of Modhusudan Dutt the testator's father and one of his three trustees. The validity of this adoption was the subject of litigation which terminated by the judgment reported in L. R. 27 Ind. Ap. 128, which decided that a joint power to adopt was conferred on the three executors by the will and was invalid in law, in consequence of which the son adopted in fact had no status in the family.

On August 14, 1904, the testator's widow died, and on December 19, 1904, Ranimoni, one of the two daughters, sued Srimutty Premmoni Dassi, his other daughter, her four sons (the two younger of whom were born after Hurry Dass Dutt's death) and Jugul Kissory Sen, a son adopted to the plaintiff and her husband on November 2, 1900.

The plaint contended that under the will in the events that had occurred the plaintiff and her sister were each entitled absolutely to a moiety in their father's estate. The reliefs sought were the administration and partition of the estate, with various reliefs incidental thereto, but the principal relief claimed was a declaration of the rights of all the parties to the suit on the true construction of the said will.

The appellants the two elder sons of Premmoni submitted that they were entitled absolutely to the residue of the estate of the testator, subject only to a life-interest therein of his two daughters. The defendant Premmoni, in her written statement, inter alia, alleged that there was an intestacy on the death of the testator as to the residue of his estate, and that in the events which had happened she, being a daughter with sons, was preferential heir to the plaintiff, who was a widow at the date when the succession opened out without a son having been born to her, and that she succeeded to the estate and acquired the estate of a Hindu daughter to the exclusion of the plaintiff and her adopted son. The written statement of her two younger sons, who did not appeal, was to the same purport and effect as her own.

Woodroffe J. decided that there was no intestacy, that there was on the true construction of the will a gift to the adopted son of the testator with a valid gift over to the testator's daughters. He also held that each of the daughters took an absolute estate in her half-share, and expressed no opinion as to the rights of the parties in the event of the death of one of the daughters leaving no natural son her surviving. A decree was accordingly made declaring that the plaintiff was entitled absolutely to a one-half share in her father's estate, with inquiry as to the estate and partition.

The High Court in appeal decided that under the will the daughters each took a one-half share in their father's estate absolutely, and refused to decide what the rights of the parties would be in the event of one of the daughters dying without male issue. In the result the decree of the Court below was varied, the declaration of the plaintiff's rights was affirmed, and the inquiry as to the property and partition thereof was refused in the present suit.

The material portion of the High Court (Maclean C. J., Sale, Harington, Mitra, and Mookerjee, JJ.) judgment was as follows :—

" The desire of the testator for the perpetuation of his male line and inheritance by an adopted son having failed, the question has arisen as to the validity of the bequest to his daughters. The failure of the bequest to the adopted son is

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due to the fact that the testator did not live to himself adopt a son, and to the fact that the power given by the will is void under the Hindu law. There was none and there could be none to answer the description of an adopted son capable of taking under the will on the death of the testator. The failure was not due to the legal invalidity of the bequest. It was not void as contravening the rule of Hindu law that a gift must be to a sentient being capable of taking, as it is clear on the authorities that a gift may be made to a son to be adopted by the testator's widow, a son who by a fiction of law is supposed for this purpose to be in being at the date of the testator's death; nor was it void on the ground that the testator intended to create a line of heirs unknown to Hindu law, as was unsuccessfully attempted by the testator in the *Tagore Case* (1) and *Kristoromoni* v. *Narendro Krishna Bahadur*. (2) Nor was the bequest void under any of the rules laid down in ss. 100, 101, and 102 of the Indian Succession Act, sections which have been made applicable to Hindus by the Hindu Wills Act (XXI. of 1870). The will having been executed in 1875, the Hindu Wills Act applies to it.

"Has then the failure of the bequest to an adopted son rendered the bequest to the daughters of the testator void? We see no reason for an answer in the affirmative. The principle well established by *Jones* v. *Westcomb* (3), *Statham* v. *Bell* (4), *Meadows* v. *Parry* (5), *Murray* v. *Jones* (6), *Mackinnon* v. *Sewell* (7), and *Avelyn* v. *Ward* (8) has been codified in India in s. 116 of the Indian Succession Act, which says: 'where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.' The prior bequest in the present case has failed ab initio by reason of its object never coming

(1) (1872) L. R. Ind. Ap. Suppl. 47; S. C. 9 Beng. L. R. 377.
(2) (1888) I.L.R. 16 Calc. 383.
(3) (1711) 1 Eq. Cas. Abr. 245.
(4) (1774) Cowp. 40.
(5) (1812) 1 V. & B. 124.
(6) (1813) 2 V. & B. 313.
(7) (1831) 5 Sim. 78.
(8) (1750) 1 Ves. Sen. 420.

into existence, and according to s. 116 the executory gift takes effect, notwithstanding that it was intended to take effect in defeasance of the prior gift. There is a necessary implication in favour of the daughters; as there cannot be the shadow of a doubt that the testator would have wished that his daughters should get his property on failure of adoption. Sect. 116 enables us to give effect to this necessary implication of the will paying regard to the substantial effect of the contingency specified by the testator. In *Okhoymoney Dasee* v. *Nilmoney Mullick* (1), the learned judges applied the principle in *Jones* v. *Westcomb* (2) to the will of a Hindu executed in 1860, and on the failure of the prior gift, though not in the particular manner indicated in the will, the gift over was allowed to take effect.

"Sect. 117 of the Indian Succession Act qualifies to some extent the rule in s. 116. Where the will shews an intention that the second bequest shall take effect *only* in the event of the first bequest *failing in a particular manner* the second bequest shall not take effect unless the prior bequest fails in that particular manner. We do not think that, in the present case, the will shews any such intention—an intention that the gift over shall not have effect unless, as in the case of gift on a condition, the very event on which the gift is made contingent be fulfilled with strict exactness. The bequest to the daughters in the will under construction is to take effect if the bequest to the adopted son fails. There are no words in the will which would make s. 117 applicable and prevent the operation of the general rule laid down in s. 116. The primary intention of the testator failing, the secondary intention—the intention to benefit his daughters—may and ought to be given effect to, and we do not think that s. 117 prevents this. In the absence of express words or necessary implication restricting the operation of the intention to benefit the daughters, we ought to put a construction on the will which will effectually fulfil that intention.

"Sect. 111 of the Indian Succession Act and *Norendra Nath Sircar* v. *Kamalbasini Dasi* (3) and *Monohur Mookerjee*

(1) (1887) I. L. R. 15 Calc. 282. (2) 1 Eq. Cas. Abr. 245.
(3) (1896) L. R. 23 Ind. Ap. 18.

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and Others v. *Kasiswar Mookerjee and Others* (1) have been relied on by the learned counsel for Premmoni in support of his argument that the bequest to the daughters being contingent on the adopted son dying without male issue during the lifetime of the testator's widow—a specified uncertain event—the bequest cannot take effect. The contingency, however, happened before the period of distribution as contemplated by s. 111, for the reason of the failure of the prior bequest ab initio and its incompetency to take effect. Sect. 111 applies only when the prior bequest is capable of taking effect and is not ab initio void. If a bequest has failed ab initio, as in the present case, the principle laid down in s. 116 applies. Assuming the period of distribution to be the death of the testator, the contingency happened before it. We are, therefore, of opinion, that the daughters Ranimoni and Premmoni have taken under the will of their father and have taken as tenants in common.

"What then is the nature of the estate they have respectively taken? Is it an estate for life, each being entitled to one-half, or is it an absolute estate in equal moieties, or an absolute estate, in equal moieties defeasible in the event of their dying without male issue? The testator directed that, on the failure of the adopted son or his male issue during his widow's lifetime, his estate, real and personal, should be divided and made over to his daughters in equal shares, and if no other words were added, the daughters would undoubtedly take the whole interest of the testator, an estate of inheritance. They were married daughters, and the rule which has been applied to a bequest in a will executed before September 1, 1870, of immovable property by a husband to his wife, when there are no express words creating an absolute estate, cannot apply to them. Though under the Hindu law a married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by will, unless her interest is curtailed by express words or by necessary implication. We may refer to s. 82 of the Succession Act and *Ramasami* v. *Papayya* (2), *Lala Ram Jewan Lal* v. *Dal Koer* (3), *Musst. Kollany Koer* v. *Luchmee Pershad* (4), *Bhoba Tarini Debya*

(1) (1897) 3 C. W. N. 478.
(2) (1893) I. L. R. 16 Madr. 466.
(3) (1897) I. L. R. 24 Calc. 406.
(4) (1875) 24 Suth. W. R. 395.

v. *Peary Lall Sanyal* (1), and *Atul Krishna Sircar* v. *Sanyasi Charan Sircar* (2) in support of our view.

"The words in the will, 'to whom and their respective sons I give devise and bequeath the same' do not indicate that the testator intended to create in favour of his daughters an estate for life with a remainder over to their sons. They cannot be construed as creating successive estates. Neither can the words be construed as creating joint estates in favour of the daughters and their respective sons. In fact Ranimoni had no son at the time of the testator's death, and so far as she is concerned she could not take a joint estate with her son or sons. She must be held to have taken an absolute estate. The word 'sons' was, in our opinion, used as a word of limitation, and was intended to have the same effect as the words 'sons, grandsons, &c.' The testator has used the word 'sons' and 'male issue' without distinction. We, therefore, agree with the Court of First Instance that each daughter took an absolute interest in a moiety of the estate. It is premature to decide whether that gift is defeasible in the event of either daughter dying without male issue. Following the practice adopted by the Judicial Committee in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (3), we leave the question open until it is ascertained what the events are.

"In the view we take, it is unnecessary for us to say what interest Ranimoni would have taken if the bequest to her and her sister had failed and there had been an intestacy.

"We, therefore, agree with Woodroffe J. as to his construction of the will of Hurry Dass Dutt and the declarations he has made as regards the rights of the plaintiff and the defendant Premmoni."

The High Court, however, excluded from their decree any directions of inquiry as to the estate and its accumulations, and a partition. The representatives of Hurry Dass Dutt and of Surnomoni were not parties to the suit.

De Gruyther, for the appellants, contended that the judgments of the Courts below were wrong in construing the will as entitling

(1) (1897) I. L. R. 24 Calc. 646. (2) (1905) 9 C. W. N. 784.
(3) (1897) L. R. 24 Ind. Ap. 76.

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each of the two daughters of the testator to an absolute interest in a moiety of his estate. The words "and their respective sons" could not be construed in a Hindu will as words of limitation. A Hindu must not be taken to intend that his daughters should take absolute estates instead of women's estates, unless he has said so clearly. A technical rule of English construction founded on English real property law cannot be imported into the consideration of a Hindu will so as to impute to a Hindu a desire that his property should devolve in a manner contrary to Hindu law and custom. A direction to that effect must be the necessary result and meaning of the words used: see *Mahomed Shumsool* v. *Shewukram.* (1) The true construction, it was submitted, was that the daughters should each take for life, and that subject to their life estate the appellants as the only survivors of the daughters' sons took, in the events which have happened, an absolute estate in remainder. He referred to *Hirabai* v. *Lakshmibai* (2); *Annaji Dattatraya* v. *Chandrabai* (3); *Hari Lal Pranlal* v. *Bai Rewa.* (4) He also contended that the Courts ought to have declared the rights of all parties in the event of one of the said daughters dying without leaving a natural son her surviving; and referred on this point to *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (5); *Surajmani* v. *Rabinath Ojha.* (6) He also cited Dayabhaga, c. 4, ss. 2, 3; Stokes' Hindu Law, 247, 253, 259; Mayne's Hindu Law, 7th ed. p. 900, s. 673; and the *Tagore Case.* (7)

Sir R. Finlay, K.C., and *Kenworthy Brown*, for the respondent Ranimoni Dassi, contended that on the true construction of the will each of the daughters took absolutely a moiety of the testator's estate, and that the appellants were consequently excluded. They relied on the reasoning contained in the judgments of the Courts below. They referred to ss. 82, 106, 111 and 177 of the Indian Succession Act, made applicable to Hindu wills by the Hindu Wills Act (XXI. of 1870). The rule of construction provided by s. 82 was that a testamentary gift passed the whole

(1) L. R. 2 Ind. Ap. 7, 14.
(2) (1887) I. L. R. 11 Bomb. 573, 578.
(3) (1892) I. L. R. 17 Bomb. 503.
(4) (1895) I. L. R. 21 Bomb. 376.
(5) L. R. 24 Ind. Ap. 76.
(6) Ante, p. 17.
(7) (1872) L. R. Suppl. Vol. 47.

interest of the testator unless the language of the will expressly restricted it, and in this will no intention to restrict the gift was expressed or to be collected from the terms of the will. By s. 111 the provision respecting survivorship in the will referred to the case of a daughter's death during the testator's lifetime. On the authorities an absolute estate was given to the daughters. Reference was made to *Lala Ramjewan Lal* v. *Dal Koer* (1); *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2); *Manikyamala Bose* v. *Nanda Kumar Bose* (3); *Bhoba Tarini Debi* v. *Peary Lall Sanyal* (4); *Atul Krishna Sircar* v. *Sanyasi Churn Sircar* (5); Stokes' Hindu Law Books, 241; Dayabhaga, c. 4, ss. 1 and 23; *Annaji Dattatraya* v. *Chandrabai* (6); *Lakshmibai* v. *Hirabai*(7); *Hirabai* v. *Lakshmibai* (8); *Ramasami* v. *Papayya* (9); *Ramlal Mookerjee* v. *Secretary of State for India* (10); *Bhoobun Mohun Debi* v. *Harrish Chunder Chowdhry* (11); *Basanta Kumari Debi* v. *Kamikshya Kumari Debi* (12); *Norendra Nath Sircar* v. *Kamalbasini Dasi* (13); and *Agency Co.* v. *Short.* (14)

De Gruyther replied, and as to the argument founded on s. 82 of the Indian Succession Act contended that the daughters' interest was intended to be restricted according to the directions contained in the will, for only those daughters' sons who were born before the testator's death were to inherit his estate. If the gift of the daughters had been absolute, their sons born after his death would have been entitled equally with those born before. Sect. 111, it was contended, did not apply. He referred to *Hunoomanpersaud Panday* v. *Koonweree* (15) and some of the cases cited by the respondent; also to *Chotaylall* v. *Chunnolall.* (16)

The judgment of their Lordships was delivered by

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May 14.

SIR ANDREW SCOBLE. Hurry Dass Dutt, a Hindu inhabitant of Calcutta, died on October 30, 1875, leaving a will which was

(1) I. L. R. 24 Calc. 406, 410.
(2) (1896) L. R. 23 Ind. Ap. 18, 25.
(3) (1906) I. L. R. 33 Calc. 1306, 1314.
(4) I. L. R. 24 Calc. 646.
(5) (1905) I. L. R. 32 Calc. 1051, 1056.
(6) (1892) I. L. R. 17 Bomb. 503.
(7) (1886) L. L. R. 11 Bomb. 69.
(8) (1886) I. L. R. 11 Bomb. 573, 579.
(9) (1893) I. L. R. 16 Madr. 466.
(10) (1881) L. R. 8 Ind. Ap. 46, 61.
(11) (1878) L. R. 5 Ind. Ap. 138, 146.
(12) (1905) L. R. 32 Ind. Ap. 181.
(13) L. R. 23 Ind. Ap. 18, 25.
(14) (1888) 13 App. Cas. 793.
(15) (1856) 6 Moo. Ind. Ap. 393.
(16) (1878) L. R. 6 Ind. Ap. 15, 31.

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admitted to probate by the High Court on December 20, in the same year. The will was in the English language, and was probably drawn by an English solicitor, who is one of the attesting witnesses.

The only question raised upon this appeal is as to the nature of the estate which, in the events which have happened, the testator's daughters take under the terms of the will.

The clause of the will relating to the daughters is as follows: "But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors, after the death of my said wife, or the death of such son after her, but under the age of eighteen years without leaving a son or sons, to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike.

Woodroffe J., by whom the case was heard in the first instance, held that the intention of the testator was "to benefit the adopted son, and should the provisions (of the will) in this respect in any manner fail, then those who were of his own blood namely, his daughters;" that the words "and their respective sons" are used as words of limitation and not of purchase; and that upon the true construction of the will, the daughters were "each entitled to a moiety of the estate of the testator absolutely." He expressed no opinion, however, as to the right of the parties in the event of the death of one of the daughters leaving no natural son her surviving. Upon appeal to the High Court his judgment, upon these points, was confirmed.

With great respect for the learned judges in the Courts below, their Lordships are unable to concur with their decision. This is the will of a Hindu, and as observed by this Committee in the case

of *Mahomed Shumsool* v. *Shewukram* (1), " in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family ; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In spite of the assistance of his English solicitor, it appears to their Lordships that in this case the testator has clearly succeeded in shewing that his daughters, whom he incontestably intended to benefit, were not to have more than what is generally known to be a woman's estate in his property. This is established by the gift to them " and their respective sons," and by the proviso that in the event of one of the daughters dying " without leaving any male issue surviving," then the share of the deceased daughter is to go to the surviving daughter and her sons, to the exclusion in both cases of female issue. Moreover, " in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share alike." No language could more clearly shew that the intention of the testator was to exclude his daughters' daughters from the succession, to which they would have been entitled under the ordinary Hindu law, if their mother's estate had been absolute ; and the reason of this is obvious, as the sons of his daughters would be competent to offer funeral oblations to him, the strongest of all possible arguments to an orthodox Hindu.

The learned counsel for the respondents strongly relied on s. 82 of the Indian Succession Act, 1865, which provides that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." As already pointed out, it is abundantly clear that, under the terms of the will, only a restricted interest was intended to pass to a daughter dying without male issue.

In the opinion of their Lordships, according to the true construction of the will, the intention of the testator was to create

(1) L. R. 2 Ind. Ap. 7, at p. 14.

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in favour of his daughters an estate for life with a remainder over to their sons, and the learned judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dassi and Permmoni Dassi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves. They will humbly advise His Majesty that this appeal ought to be allowed and the decree of the High Court varied in accordance with this judgment, and that in other respects the decree ought to be affirmed. Under the circumstances, the costs of the appeal, taxed as between solicitor and client, must be paid out of the estate.

Solicitors for appellants : *Watkins & Lempriere.*
Solicitors for respondent Ranimoni Dassi : *T. L. Wilson & Co.*

J. C.*
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May 13;
June 2.

BANK OF BOMBAY . . . . . DEFENDANT;

AND

SULEMAN SOMJI . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Presidency Banks Act, 1876—*Bank's Register of Shareholders—Claim of Shareholder to inspect Register—Extent of Common Law Right to inspect.*

The respondent, holder of a single share in the Bank of Bombay, sued for a declaration of his right (with consequential relief) to inspect and take extracts from its register of shareholders, alleging various irregularities in the management, and a desire to communicate with the shareholders with a view to its improvement :—

Held (overruling the Court of Appeal), that the suit must be dismissed. There being no applicable provision in the Presidency Banks Act, 1876, or other statute, the respondent's only right was at common law and was restricted to cases where he had in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object. Relief will not be granted unless the plaintiff shews clearly that he has such definite legal right, that he has definitely claimed it and no other, and has been refused.

Rex v. *Merchant Tailors' Co.*, (1831) 2 B. & Ad. 115, approved.

APPEAL from a decree of the High Court (January 22, 1907) reversing a decree of Scott J. (August 6, 1906).

**Present*: LORD MACNAGHTEN, LORD JAMES OF HEREFORD, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

The Bank of Bombay acts as bankers for Government and was incorporated in the year 1876 under the Presidency Banks Act, 1876, and its constitution, powers, rights and, privileges, and the powers, rights, and privileges of its shareholders, are defined and described in the various provisions of that Act.

At the date when that Act was passed, the Indian Companies Act, 1866, s. 31, gave to shareholders in other companies an express right to inspect the register of shareholders, but no such right was expressly or impliedly given by the Presidency Banks Act, 1876. Neither that Act nor the Companies Act of 1882 applies to the bank.

The respondent acquired his one share in the bank on April 18, 1906, and six weeks afterwards (namely, on June 1, 1906) he claimed as of right to be allowed to take a copy of the list of the bank's shareholders with full addresses; and on June 4, 1906, he claimed as of right to be furnished with such a list. At these times it was alleged that the respondent was and continued to be engaged in other litigation with the bank, and that his brothers were engaged in litigation with one of the bank's directors.

The bank refused to acknowledge the respondent's claim of right and requested the respondent to state for what purpose and under what authority he required and claimed to be furnished with a list of the shareholders. The respondent refused to comply with this request (beyond making allegations of irregularities, and a desire to communicate with the shareholders), and early in July, 1906, he filed his plaint, claiming (*a*) a declaration that he was entitled at all reasonable times to inspect the register of shareholders of the bank and to copy and take extracts therefrom; (*b*) an order on the bank to give such inspection and to allow the respondent to take copies of and extracts from the said register; and (*c*) other ancillary relief.

The only evidence given was that of the respondent, who tendered himself for cross-examination. Scott J. was of opinion that there was no right of inspection by statute, and that by common law a right to inspect only existed where it was "necessary with reference to some specific dispute or question depending in which the parties applying were interested, and inspection would then only be granted to such extent as might be necessary

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for the particular occasion." He held that the plaintiff had disclosed nothing sufficiently definite to entitle him to claim inspection, and came to the conclusion that the plaintiff did not require inspection for the protection of any interest of his which was in jeopardy, or with reference to any particular dispute in which he was interested, but that he merely wished to cause annoyance to the bank officials.

The High Court in appeal held that Scott J. had taken too narrow a view of the common law right of a corporator to inspect books of the corporation, and that "a member of a corporation as such is entitled to the inspection of any of its documents, if he satisfies the Court that he is seeking inspection not from mere idle curiosity or for some speculative purpose, but that he had some reasonable and definite object in which he is interested, and for which the inspection is required, whether that definite object concerns or not any subject then actually in controversy or discussion." The High Court also found that the plaintiff had disclosed a reasonable and proper object for which he desired inspection, that he was interested in the object, which itself was specific and definite, and that the object could not be attained without an inspection of the register of shareholders. It was pointed out that the claim was limited to the inspection of the said register alone, and that no suggestion had been made that an inspection of the said register would in any way harm or prejudice either the interests of the bank or the interests of the shareholders. The Court further held that the plaintiff had sufficiently intimated to the officials of the bank the object of his inspection, and that the refusal of the bank to allow inspection was improper.

Levett, K.C., and *Frank Russell*, K.C., for the appellant bank, contended that its shareholders were not under the Presidency Banks Act (XI. of 1876) or the common law or otherwise entitled to inspect the bank's register of shareholders or to copy or take extracts therefrom. Reference was made to ss. 1, 4, 7, 17, 22, 37 (*b*), and 68 of that Act; also to the Indian Companies Acts X. of 1866, ss. 31 and 231, and VI. of 1882, ss. 55 and 256. The provisions of the last two Acts were expressly not applicable to

the appellant bank. Even if the right existed as claimed it is subject to a discretionary power in the bank's directors to disallow the exercise of that right if they bona fide think fit to do so; and the evidence shewed that the respondent did not require inspection for any reasonable purpose, that is, for the protection of any specific interest of his own. The decree appealed from is of too wide an application and is not limited to the actual occasion in question. Reference was made to *Rex* v. *Merchant Tailors' Co.* (1) and in *In re Burton* (2)

De Gruyther, K.C., and *Kyffin*, for the respondent, contended that in the circumstances and as of right he was entitled to the inspection of the register of shareholders as claimed by him. Reference was made to the Presidency Banks Act, 1876, ss. 24 and 31, to s. 11 of Act VI. of 1839, and s. 13, Act IV. of 1862, *Mutter* v. *Eastern and Midlands Ry. Co.* (3) It was contended that the Indian Companies Act gave a statutory right of inspection which was not taken away by the Presidency Banks Act. Independently of statute the common law right of inspection extended to cover a case of this kind. With regard to the directors' discretion, they intimated to the respondent that they would allow inspection if satisfied that it was wanted for use in the respondent's interest as shareholder. The respondent replied that there had been gross irregularities in the management of the bank, in the election and conduct of the directors, and in other matters, and that to withhold inspection was to prevent communication with the shareholders with a view to concerted action.

Levett, K.C., replied.

The judgment of their Lordships was delivered by

1908
June 2.

LORD ATKINSON. This is an appeal from a decree, dated January 22, 1907, pronounced by the High Court of Judicature at Bombay (sitting in appeal from its original civil jurisdiction), by which a decree, dated August 6, 1906, of the High Court (sitting in its ordinary original civil jurisdiction) was reversed and set aside. By this latter decree the respondent's action was dismissed with costs.

(1) 2 B. & Ad. 115.
(2) (1861) 31 L. J. (N.S.) Q. B. 62.
(3) (1888) 38 Ch. D. 92.

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The respondent is a holder of one share in the appellant company, the Bank of Bombay, one of the banks incorporated in 1876 by the Indian statute of that year entitled the Presidency Banks Acts, 1876.

It was suggested that the respondent purchased this share for the purpose of causing annoyance to the bank owing to the fact that some other litigation to which he was a party had been instituted against the bank and was still pending. There was no satisfactory evidence given to sustain this allegation.

From the correspondence which took place between the respondent and the bank before the institution of this suit, it is, in the opinion of their Lordships, perfectly plain that the respondent claimed a right to inspect the register of the shareholders of the bank, and to be supplied with a list of such shareholders, as absolute and unqualified as is that conferred on the shareholders of joint stock companies in this country by s. 32 of the Companies Act, 1862, or in India by s. 31 of the Indian Companies Act, 1866, and s. 55 of the Indian Companies Act, 1882.

It must be taken that the appellants refused to recognize this absolute and unqualified right, or to comply with the claim based upon it, but in their letter of June 21, 1906, which conveyed this refusal, they informed the respondent that they would be pleased to furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a shareholder. It is, therefore, clear that, before action brought, the qualified and restricted right to inspect and take extracts from the register contended for in argument on behalf of the respondent was never asserted, nor any limited demand based upon it ever made or refused.

In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from the register on some definite matters in which he himself was interested. He alleges therein that he had observed irregularities in the management of the bank, in the election of its board of directors, in the advancing of large sums of money to its directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other shareholders

and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the bank and the removal of some of the directors, which he intended to propose at the general meeting of the shareholders to take place on August 9, 1906. But though this is the purpose for which, and the occasion on which, he claimed the right to inspect, copy, and take extracts from the register, the decree of the Court of Appeal contains no restriction whatever. It is couched in the widest terms. It ignores both the occasion and the purpose, and declares expressly that the respondent, as long as he is a shareholder of the bank, is entitled at all reasonable times to inspect the register of shareholders of the bank, and to copy and take extracts from the said register, and it then proceeds to order that the bank do give such inspection, and do allow the respondent, as long as he is a shareholder of the bank, to take copies of and extracts from the register, and then restrains the bank from preventing the respondent, as long as he is a shareholder of the bank, from having access at all reasonable times to the register for the purpose of inspection and perusal, and from preventing the respondent, as long as he is a shareholder of the bank, from taking copies of and extracts from the register.

This suit is in truth in its nature, though not in its form, somewhat of the character of an application for a writ of mandamus, and the principles regulating the issue of that prerogative writ should, their Lordships think, apply to a great extent to the granting of the relief prayed for in such a suit as this. One of these principles is this, that the writ will not be allowed to issue unless the applicant shews clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused. Nothing less, therefore, than the absolute right claimed by the respondent in the correspondence above referred to could justify the decree appealed from in its present wide and unrestricted form. Now by s. 231 of the above-mentioned Indian Act of 1866 and s. 256 of the above-mentioned Act of 1882, the appellant bank is expressly exempted from the operation of each of those statutes.

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There is no statute conferring on the members of this corporation a right to inspect, copy, or take extracts from the register of its shareholders or any other document belonging to it. The only right the respondent can have, therefore, against the bank in reference to such matters is that which at common law belongs to every member of a corporation. Their Lordships have been referred to several authorities (1) in which the nature, extent, and measure of this right is explained and defined. The learned judges in the Bombay Court of Appeal have referred to others. The result of the authorities is summed up, in their Lordships' view correctly, in Taylor on Evidence, 10th ed. 1906 vol. 2, par. 1495, in the words following: "On the application of a member the King's Bench Division will, in general grant a rule for a limited inspection of the documents of the corporation, if it be shewn that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object."

The strictness with which these limitations on the general and unqualified right of inspection are insisted on may be aptly illustrated by the case of *Rex* v. *Merchant Tailors' Co.* (2) In that case certain members of a corporation claimed the right to inspect all the documents belonging to that body on the grounds (1.) that they had heard and believed the revenues of the corporation were misapplied through the malpractices of those who

(1) *Rex* v. *Wilts and Berks Canal Co.*, (1835) 3 A. & E. 477; *Reg.* v. *Lewisham Union*, [1897] 1 Q. B. 498.

(2) 2 B. & Ad. 115.

managed the corporation's affairs; (2.) that the fines for admitting freemen and liverymen to the corporation had been unnecessarily and improperly raised; (3.) that lavish expenditure had taken place (in some instances to the applicants' own knowledge) without the consent of the majority of the members of the corporation; (4.) that a clerk of the corporation had, as the applicants had heard and believed, recently misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen or liverymen by which they could have ascertained the amount of the defalcations; and that they (the applicants) could not ascertain, unless they were allowed to look at the documents mentioned, whether the corporate funds had been properly applied and accounted for or not.

Every member of the corporation in this case obviously had an interest in each of the matters mentioned, but none of the applicants had in any of them any special interest different from that of his fellow-members, nor had they any definite purpose or object in obtaining the inspection asked for other than (in the words of Littledale J.) to see "if by possibility the company's affairs may be better administered than they think they are at present." And the writ of mandamus was accordingly refused in this case.

At the trial no witness other than the respondent was produced, and he was only tendered for cross-examination. He stated that he had heard through brokers that the bank had advanced six lakhs of rupees to three persons whom he named; that at elections the directors transferred shares to nominees who voted for them (a practice not in itself illegal); that there were now only seven directors, instead of the maximum nine; that he intended to bring in two respectable people, and that he had in the correspondence given his reasons for asking inspection. It is clear on this evidence that the respondent had no special interest in any of the matters he complained of, or any interest other than, or different from, that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate; but that, on the

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contrary, his object was similar to that of the applicants in *Rex* v. *Merchant Tailors' Co.* (1), namely, to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Their Lordships think that on this point the case is covered by the authority of *Rex* v. *Merchant Tailors' Co.* (1); that the respondent is not in law entitled to the extended right to which the decree declares him to be entitled; that the limited and qualified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon is ever refused; and they are therefore of opinion that the decree appealed from is erroneous and should be reversed with costs, and the judgment and order of Scott J. restored. They will humbly advise His Majesty accordingly. The respondent must pay the costs of this appeal.

Solicitors for appellants : *Cameron, Kemm & Co.*

Solicitors for respondent : *Payne & Lattey.*

(1) 2 B. & Ad. 115.

BANK OF BOMBAY AND ANOTHER . . . . APPELLANTS;

AND

SULEMAN SOMJI AND OTHERS . . . . RESPONDENTS.

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May 13, 14;
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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Will—Plaintiff's Legatees with a Charge on the Estate—Mortgage by Executors and Residuary Legatees—Constructive Notice to Mortgagee of the Will and Charge—Priority of Plaintiffs' Claim.

In a suit against mortgagors and mortgagee to establish the priority of the plaintiffs' charge on the mortgaged property, it appeared that the mortgagors were executors and residuary legatees under the will of the last owner, of which the mortgagee had constructive notice, subject to a charge in favour of the plaintiffs to answer out of his estate (including the mortgaged property) a pecuniary legacy directed to be paid to them six years after the testator's death, the mortgage having been executed fourteen years thereafter:—

Held, that the plaintiffs were entitled to priority. Lapse of time did not affect the rights of the parties, for the continued possession by the executors was not inconsistent with the purposes of the will, and the mortgagee was not entitled to assume that they had mortgaged with the plaintiffs' consent.

Graham v. *Drummond*, [1896] 1 Ch. 968, distinguished.

APPEAL from a decree of the High Court (April 14, 1905) varying a decree of Chandavarkar J. (August 23, 1904) and declaring that the properties in suit formed part of the estate of the testator Somji Parpia, and were, as such, available for the payment of the legacy and allowances of Rs. 30,000 and Rs. 125 per month and interest to the respondents, four sons of the testator by his second wife, in priority to the claim thereon of the appellants under a mortgage of the same properties, dated January 12, 1899, effected by his four elder sons by his first wife, who were the executors of and residuary legatees under his will.

The testator was a Khoja Mahomedan inhabitant of Bombay who carried on business there as a furniture dealer.

The will was dated February 13, 1885. The 1st clause recited his property, and the 2nd that among his heirs were his four elder

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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sons by his deceased wife, the four younger sons by his second wife then living, and certain other children and grandchildren therein named. The 3rd and 4th clauses gave all his property and goods to his four elder sons, directing them as regards his remaining heirs to duly give and act in accordance with what has been written below.

"Clause 5. To my present surviving wife Labai and to her sons named Suleman, Gulam Ali, Mahomed and Habib, my said elder sons, four persons, to whom I entrust all my goods and property, shall within six years namely, six years after my decease duly make up and pay Rs. 30,000 namely, thirty thousand to my surviving wife and to her sons. The same shall be paid (to them) in the following manner. No interest on the said (sum of) money shall be paid up to the above mentioned period, and up to that period there shall duly be paid Rs. 125 namely, one hundred and twenty-five every month for household expenses, and before the above mentioned sum of Rs. 30,000 namely, thirty thousand is fully made up if the betrothal (or marriage, &c.) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (above mentioned) sum, and when the above mentioned sum of rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of rupees one hundred and twenty five, being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against four persons (namely my) sons by my first deceased wife or against my said goods and property in any way whatever.

"Clause 6. As to the (sum of) rupees thirty thousand directed to be paid out of my above mentioned goods and property, as a share of inheritance by my above mentioned elder sons four persons to my surviving wife and her sons mentioned in the 5th clause, I appoint four persons as trustees in respect of the said (sum of) money. Their names are Jafar Somjee, Gulam Husein Somji, Jafer Ladhabhai Chatu, and my second surviving wife, I appoint these four persons (as trustees), and I direct them

as follows :—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the above mentioned sum of rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons, as a share of inheritance, the outlays on auspicious and inauspicious occasions, whatever the same may come to, having been deducted as to whatever um mayremain over a good 'estate,' or a house,shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them ; or (the money) shall be deposited at interest, at a good place, and out of the income that may be realised therefrom (moneys) shal be paid to my surviving wife during her lifetime, for her and her children's lodging, food and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out), of the said (sum of) rupees thirty thousand the same shall truly be divided and given in equal shares to her children."

By clause 9 he recommended the four elder sons as follows : If his said second surviving wife and her sons should live in peace and harmony with them the four elder sons should allow them to live in the moiety belonging to him of the said house, situated in Bhajipala Street.

By clause 12 he nominated and appointed the four elder sons executors of that his will, and they should truly bring into force all the provisions of the said will.

The testator died on February 15, 1885. He left him surviving his widow Labai (who died in 1893) and the four younger sons, of whom Suleman Somji attained eighteen in the lifetime of his father and the others in 1897 and 1901.

From the death of the testator down to the death of his widow she and the four younger sons, and from her death until after the institution of the suit the four younger sons, continued to occupy the said house in Bhajipala Street aforesaid or part thereof. The respondent No. 5 is the sole survivor of the four trustees of the said sum of Rs. 30,000 bequeathed by the will of the testator. Divers sums were from time to time paid by the four elder sons in respect of the said sum of Rs. 30,000 and the monthly allowance of Rs. 125 respectively, but at the

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commencement of the suit large sums remained unpaid and owing.

After the death of the testator the four elder sons carried on business at Bombay, Indore, and other places as contractors for the construction of roads, buildings and other works, as co-partners, under the style or firm of Somji Parpia & Co. In the course of such business they had numerous financial dealings with the appellant bank, with the result that on January 12, 1899, the bank held thirteen bills of exchange, drawn on and accepted by the four elder sons, for amounts aggregating together Rs. 52,000, five of which bills, for amounts aggregating Rs. 18,500, were then overdue.

The four younger sons in September, 1903, on discovering the mortgage of January 12, 1899, sued the bank and the four elder sons, claiming that they were entitled to a charge on the property comprised therein, in priority to the bank's mortgage, to secure the balance due to them in respect of their legacy.

The trial judge held :—

(*a*) That the plaintiffs had a charge on the properties comprised in the mortgage ; that actual notice of the will of Somji Parpia had not been proved, but that the bank had constructive notice of this will.

(*b*) That according to Indian law there is no distinction between the powers of an executor over the real property and personal estate of a testator such as obtains in English law ; that the bank did not know of the breach of trust on the part of the defendants 1 to 4 and was not a party to their fraud ; and that the bank were bona fide transferees for value of the properties comprised in this mortgage.

He decreed to the effect that the bank had a first charge and that the plaintiffs were entitled to a charge for their legacy ranking subsequently to the bank's security. On the evidence he said : " The truth of the matter appears to me to be this. Judging from the evidence and the surrounding circumstances neither Labai and her adult son plaintiff No. 1 nor defendants 1 to 4 had any idea that the legacy in favour of the former was a charge on the property. All the parties lived amicably in the same house and thought as defendants 1 to 4 had the property

absolutely bequeathed to them under their father's will, they had every right to alienate it. Defendants 1 to 4 began to trade on their own account and the parties thought that that would bring in more money to them and enable them to make up the legacy to Labai and her sons. It cannot be that Labai and plaintiff No. 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the bank and were contracting debts. They hoped to share in the profits which defendants 1 to 4 were expected to make out of their trade by having their legacy provided out of those profits. The bank were not informed of the legacy or the will because the parties believed that the legacy had nothing to do with the property bequeathed to defendants 1 to 4."

The Court of Appeal agreed with Chandavarkar J. in holding that the plaintiffs had a charge on the property, that the bank had constructive notice of the will, and that as regards the law involved there is according to Indian law no such distinction as there is in English law between movable and immovable property, but they held, without impeaching the bona fides of the bank, that notwithstanding the facts that the mortgage was executed nearly fourteen years after the death of the testator and that the first four defendants were residuary legatees as well as executors of the testator's will, the bank's mortgage was subject to the payment of the plaintiff's legacy of Rs. 30,000.

With regard to the rights of the plaintiffs as legatees as distinguished from the rights of creditors in similar circumstances, the judgment contained the following passage: "In *Graham v. Drummond* (1) a second mortgagee from an executor and residuary legatee was held to have a title, which prevailed against creditors, and Romer J. (as he then was), in delivering judgment, said: 'I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator. Later the

(1) [1896] 1 Ch. 968.

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learned judge said : ' The chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound, they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me) and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration.' But in *Graham* v. *Drummond* (1), as in *Taylor* v. *Hawkins* (2), it was a creditor who sought to impugn the alienation ; here the plaintiffs are legatees."

Sir R. Finlay, K.C., *Levett, K.C.*, and *Frank Russell, K.C.*, for the appellants, contended that a legatee has no greater right than a creditor against a bona fide purchaser or mortgagee of personal estate from an executor who is also residuary legatee. The distinction taken by the Court of Appeal is erroneous. Reference was made to the Indian Probate Acts of 1881 and 1889—that is, to ss. 2, 4, 90, 113, 115, 116 of Act V. of 1881, and to s. 14 of the amending Act VI. of 1889, which substitutes a new section in lieu of s. 90 of the former Act ; and it was contended that the executors had power to dispose as they thought fit of all property, whether movable or immovable, vested in them as executors. The bank obtained this mortgage in good faith and for value, and it had been executed by executors who were also residuary legatees nearly fourteen years after the testator's death. The bank was fully justified in believing that its mortgagors were competent to give a good title, and on the

(1) [1866] 1 Ch. 968.

(2) (1803) 8 Ves. 209.

evidence it had no notice, actual or constructive, of any prior charge. Upon the true construction of Somji Parpia's will no valid charge had been created on the property in the hands of the residuary legatees. Even if it had been created the bank was entitled to assume, after so long a lapse of time, that the estate had been fully administered, and that all legacies and charges had been satisfied, especially the legacy to the plaintiffs, which was directed to be paid to them six years after the testator's death. Reference was made to *Graham* v. *Drummond* (1); *In re Whistler* (2); *Colyer* v. *Finch* (3); *In re Venn and Furze's Contract.* (4) The presumption that creditors of the testator's estate had been satisfied is equally reasonable when applied to the case of legatees. After fourteen years had elapsed from the death of the testator the bank was entitled to assume, without inquiry, that the residuary legatees were beneficially entitled to the estate of which they were in possession and with which they were dealing. The two last cited cases shew that it was immaterial that the mortgagors purported to secure a debt due from themselves personally; the bank was entitled to deal with them as beneficial owners. With regard to *In re Queale's Estate* (5), relied upon by the appellate Court, it was the case of an equitable mortgage, and there had been no long lapse of time, as in this case, to justify the presumption of the legacy having been satisfied: see also Lewin on Trusts, 11th ed. p. 557. In short, the executors' power to pledge the assets of the estate, to which they had also the title of residuary legatees, was absolute; and no assent by the plaintiffs as legatees was necessary to free the title of the mortgagee bank from the charge, if any, created in their favour by the terms of the will.

Danckwerts, K.C., and *P. S. Stokes*, for the respondents, contended that the High Court was right in holding that the mortgaged property in suit was subject to a prior charge in favour of the plaintiffs to the extent of the unsatisfied legacies in their favour. The four elder sons had no right or power under the will, or under the law relating to executors, to create any charge upon

(1) [1896] 1 Ch 968, 971, 974.
(2) (1887) 35 Ch. D. 561.
(3) (1856) 5 H. L. C. 905.
(4) [1894] 2 Ch. 101, 111, 114.
(5) (1886) 17 L. R. Ir. 361.

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the mortgaged properties in suit in priority to the claims of the plaintiffs. The mortgage granted by them was given to the knowledge of the bank to secure a pre-existing debt by them incurred by borrowing money for their own personal ends, and not for purposes authorized by the will or within the scope of their duty and powers as executors. The bank was therefore guilty of negligence in not calling for and investigating the title of its mortgagors. It must be held to have taken the mortgage with notice of the will and its contents. Both Courts were right in finding that the bank had constructive notice of the will of the testator and the rights of the plaintiffs, even if the defect in the mortgagors' title were not plain on the face of the documents. Reference was made to *Agra Bank* v. *Barry* (1), and to *Corser* v. *Cartright* (2), where constructive notice through solicitors of intended misapplication of the mortgage money was either held or regarded as being fatal to the claim of the mortgagee: see also *Jackson* v. *Rowe* (3); *Jones* v. *Smith* (4); *Patman* v. *Harland* (5); *Wilson* v. *Hart* (6); *In re Whistler.* (7) With regard to the effect of the executors mortgaging the testator's assets for their own private purposes, it was plain that that was beyond their powers. The fact that they were residuary legatees as well as executors did not enlarge their powers as executors, and could not avail the bank unless they could shew that the estates had been duly administered, and that their mortgagors were entitled solely as residuary legatees free from any trust as executors on behalf of those entitled under the will. The bank could take whatever title their mortgagors had and no more: see Roper on Legacies, p. 443; and, on the construction of the will, *In re Kirk* (8) and *Wigg* v. *Wigg.* (9) As to powers of executors under Indian law and under the will of a Mahomedan testator, see *Shaik Moosa* v. *Shaik Essa* (10); the Indian Succession Act (X. of 1865), s. 271; and the Probate and Administration Act (V. of 1881), ss. 2, 4, 5, 12, 90. As regards the distinction between the rights of creditors

(1) (1874) L. R. 7 H. L. 135, 137.
(2) (1875) L. R. 7 H. L. 731.
(3) (1826) 2 S. & S. 472.
(4) (1841) 1 Hare, 43.
(5) (1881) 17 Ch. D. 353.
(6) (1866) L. R. 1 Ch. at pp. 463, 466, 467.
(7) 35 Ch. D. 561.
(8) (1882) 21 Ch. D. 431, 437.
(9) (1739) 1 Atk. 382.
(10) (1884) I. L. R. 8 Bomb. 241.

and the rights of legatees with a specific charge on the testator's estate, the passage in the judgment of the High Court was adopted and relied upon.

Levett, K.C., replied, citing again *Graham* v. *Drummond* (1), *Mead* v. *Lord Orrery* (2), and *Taylor* v. *Hawkins* (3); *Danckwerts, K.C.*, citing, with reference to the two last cases, *In re Morgan* (4) and *In re the Alms Corn Charity.* (5)

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The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The facts relating to this appeal are not in dispute, and may be shortly stated.

Somji Parpia died on February 15, 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death the elder sons entered upon large business transactions under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances the elder sons, on September 1, 1890, deposited certain title deeds relating to the property in suit, by way of equitable mortgage, with the bank; and on January 12, 1899, the bank obtained from them a formal mortgage of the same property to secure the repayment of Rs. 52,000 in respect of bills then due, or to become due, drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road,

(1) [1896] 1 Ch. 968, 974.
(2) (1745) 3 Atk. 235, 241.
(3) 8 Ves. 209.
(4) (1881) 18 Ch. D. 93, 103.
(5) [1901] 2 Ch. 750, 762.

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in the city of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the bank's legal advisers had made an investigation of title they must have inquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will and of the charge on this portion of his estate. But they made no inquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case ; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the bank. But when the bank advertised the properties for sale they filed this suit in order to establish the priority of their charge over the mortgage to the bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. Levett, in his able argument for the appellants, contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer J. in *Graham* v. *Drummond* (1) in which that learned judge says : " I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the

(1) [1896] 1 Ch. 968, at p. 974.

plaintiffs are legatees, and the distinction between creditors and legatees is well pointed out in Spence's Equitable Jurisdiction, vol. 2, p. 376, where it is said: "A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore the mortgagee would be safe as against creditors."

Moreover, in this case the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the bank, the bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind; but having regard to the fact that in this case two of the younger sons were still minors when the title deeds were deposited with the bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will, their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance.

The case of *In re Queale's Estate* (1) bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a bank three leases to secure his own overdrawn account. The bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds;

(1) 17 L. R. Ir. 361.

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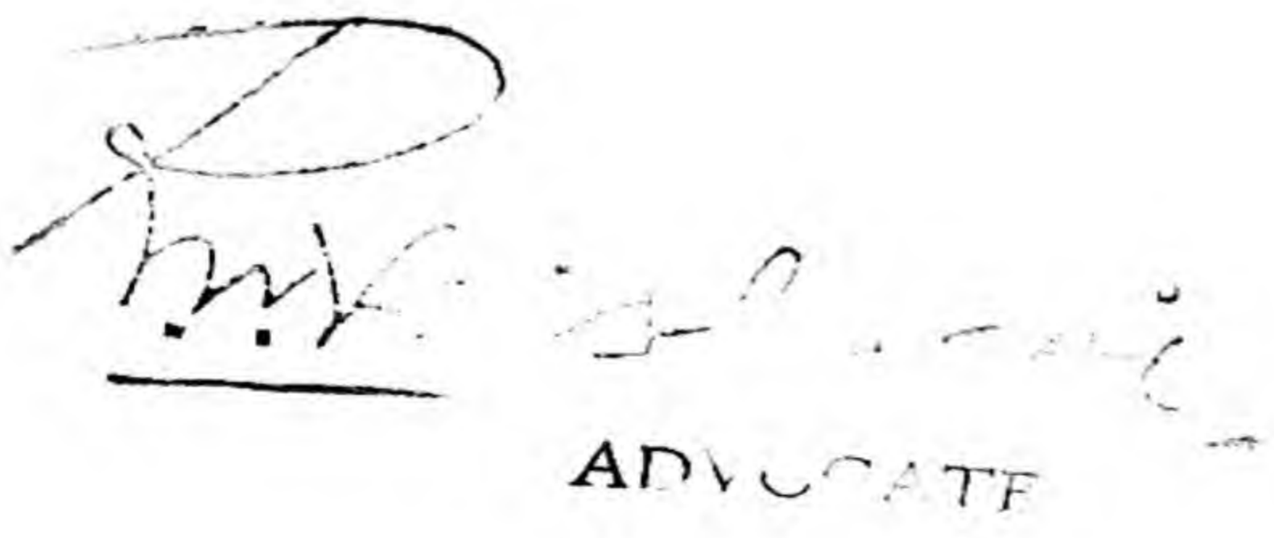
whereupon the testator's daughters claimed to be placed on the schedule as incumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering judgment Fitz Gibbon L.J. says : " The bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the bank can, in my opinion, have no better title than that which its debtor really had in the capacity in which he was dealt with, namely, as beneficial owner, i.e., as residuary legatee."

Their Lordships agree with the learned judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed and the decree of the High Court of April 14, 1905, confirmed. The appellants must pay the costs of the appeal.

Solicitors for appellant : *Cameron, Kemm & Co.*

Solicitors for respondent : *Rawle, Johnstone & Co.*



IBRAHIM ESMAEL AND OTHERS . . . . DEFENDANTS;
AND
ABDOOL CARRIM PEERMAMODE AND OTHERS . . . . . } PLAINTIFFS.

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May 20, 21, 22, 27; *July* 3.

IBRAHIM ESMAEL AND OTHERS . . . . DEFENDANTS;
AND
ABOO BAKAR MAMODE TAHER & OTHERS. PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mahomedan Law—Administration of Wakf Estate—Rights of Wakifs—Practice of Court—Scheme of Administration—Charter of Incorporation superseded.

The wakf properties in suit, situate at Port Louis, in the island of Mauritius, were as to a considerable portion of them successively purchased from 1852 onwards "for the whole Mahomedan congregation of the island," consisting of Indian immigrants from Cutch, Hallal, and Surat, all of the Soonee school, and their descendants, and were dedicated by the deeds inalienably for the purpose of a mosque. The overwhelming majority of the congregation belonged to the Cutchee class, and in 1877 the deeds of purchase for the first time declared that the properties comprised therein were bought on behalf of the Cutchees, a committee of whom was to administer them and all the other properties belonging to the mosque. Later purchases were expressed to be made, some on behalf of the Cutchees, others on behalf of the congregation. In 1903 two deeds were executed by a body of Cutchees by which they formed themselves into a society afterwards incorporated under Ordinance 22 of 1874 for certain pious and charitable purposes, declared that they brought into the society in full ownership all the said purchased properties, with extensive powers of selling and letting the same, other than the mosque and its accessories, of which latter they reserved to themselves the exclusive management.

In actions brought respectively by the Hallaye and Soortee classes the Court below ordered both deeds to be set aside so far as they gave exclusive administration as of right to the Cutchees, aud substituted for the portion thus set aside a scheme giving to the plaintiffs a share in the administration, but subject to future modifications:—

Held, in appeal, that as the deeds could not be maintained consistently with the rights of the plaintiffs they should be set aside in toto.

Held, further, that as the charter of incorporation in consequence

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR J. H. DE VILLIERS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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became inoperative, the amending scheme must also be set aside. The Court could neither grant a new charter nor under the circumstances amend the superseded one.

CONSOLIDATED appeals from two decrees of the Supreme Court (June 25, 1906) cancelling and setting aside two instruments dated in 1903 whereby provision was made for the management of the chief mosque at Port Louis and for the administration of certain properties held in connection with the mosque.

The first instrument was an agreement entered into between the appellants and numerous other Cutchee Mahomedans for the management of the mosque; the second was a notarial deed of society whereby certain properties held in connection with the mosque and admitted on all hands to be wakf or property dedicated to pious and charitable uses were vested in the appellant society, which was constituted by the deed with a view to its incorporation, and which subsequently was incorporated by Government proclamation.

The respondents in the two appeals were Hallayes and Soortees respectively, and they attacked the two instruments in question on the ground that they provided for exclusive administration by the Cutchees and in their interests, alleging that the mosque as well as all immovable properties in the deed of society had been acquired by the contributions of all the Mahomedans of Mauritius, including the two classes represented by themselves. The properties consequently belonged beneficially to the whole Soonee Mahomedan congregation, including all who were members thereof at the date of acquisition and all who might subsequently become members. They contended that the two instruments were illegal, null, and void, and prayed that the Court would settle a scheme for the future management of the whole religious foundation.

The defendant Cutchees claimed an exclusive right thereto. They claimed to have been the wakifs or creators of the trust, entitled by Mahomedan law as understood in the island to the management; otherwise that by virtue of their services in connection with the wakf they occupied by tacit consent of the congregation a special position entitling them to special consideration, and that in equity they should be maintained in that

position until forfeited by misconduct. The claimed that in entering into the formal agreement complained of for the administration of the wakf exclusively by their caste they merely affirmed a well-known and existing position, and that in getting themselves incorporated and having the wakf property vested in them they were taking the best measures to protect the property and secure to the beneficiaries the fulfilment of the trusts.

The Supreme Court found that the properties in suit were wakf, that both its creators and beneficiaries must be taken to be a de facto association of members of the Mahomedan congregation; that the position of the managers was that they had a tacit mandate from the members, but no inherent right as a caste; that the two deeds impugned by the suits constituted a flagrant breach of the tacit agreement by which the defendants had been allowed to administer the wakf and were ultra vires; and that their administration had been intelligent and successful. It then proceeded:—

"We would unhesitatingly have maintained the administration such as it existed prior to the passing of the impugned deeds had we not been satisfied that in view of the unwarranted action of the administrators as evidenced by those deeds they have given just cause to their co-religionists to ask that the system of administration be modified.

"We have of course, being of the opinion stated above on the points touched upon, necessarily set aside the two deeds in so far as they purport to give to the Cutchee caste the exclusive administration as of right of the mosque and its accessories and to place at the disposal of an exclusively Cutchee society distinct from the mosque the remainder of the wakf property.

"As a consequence of this decision we had to decide how the mosque is to be administered.

"That the administration must be a Soonee administration is to us clear, for though there are no sectarian differences between the various castes of Soonees in the Colony there are differences between the Soonee and other sects who in fact have provided themselves with mosques of their own. The Cutchees Soortees and Hallayes are the most prominent and influential sections of

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the Soonee school and may be said to be thoroughly representative of the Mahomedan congregation for whose benefit the wakf has been created. The proper course would we think be to incorporate the Soonee Mahomedans, and when they are incorporated to entrust the management of the wakf to the society. We have been told that this would be difficult owing to anticipated opposition in the Council of Government. On the other hand it has been pointed out that there is ample precedent for incorporation of religious societies, and that it is overrating difficulties to anticipate that incorporation will be refused to a Mahomedan community for whose benefit property is known to exist, requiring to be administered in connection with their religious worship and pious works, when such incorporation has been invariably granted to other religious communities. Be that as it may, letters of incorporation cannot be granted by this Court, so we must consider other measures.

"We have been asked to maintain the status quo ante as regards the administration with restrictions as to disposal of wakf property. Having set aside the two deeds for the reason we have stated we cannot of course act upon this suggestion. We have fully recognized the services rendered to the mosque by the Cutchee Maimans firm. They have not it is true by drawing upon their own pocket but by intelligent organization and management brought the wakf to its present satisfactory condition. They have in a sense as administrators created the great wealth of the mosque, and it is we think right despite their final fault that they should continue to hold an important position in the management. But we on the other hand are satisfied that they should not stand alone as managers. The other two castes should also be represented in the administration so that they may know what is being done, may express their views, and may guard against any relapse on the part of the Cutchees in their tendency to assume exclusive rights. We have therefore thought it expedient to maintain the committee of Cutchees appointed by the Cutchee constituents in the two deeds we have notified whilst adding to them three representative Soortees and one representative Hallaye and so ordering that any licensed Soonee Mahomedan may acquire knowledge of what is being done if he so desires.

The Cutchees will be in a majority on the committee of seven to four, but, the Court reserving the right of modifying the composition of the committee and system of administration on sufficient cause shewn, if the majority abuses its power or if circumstances materially change after hearing all interested parties other arrangements can be made. We have however stated that this arrangement is pending the formation of an incorporated society of all Soonee Mahomedans in whom the property can be lawfully vested. Should such a society be formed we would have to consider the expediency of transferring to it the administration now provided for."

Sir R. Finlay, K.C., and *J. B. Matthews*, for the appellants, contended on the evidence that the wakf was founded exclusively by Cutchees, that they provided the money wherewith the mosque was built and the properties were purchased. If the classes represented by the respondents subscribed at all, their subscriptions were merely to assist the Cutchees, and did not constitute them co-founders of the mosque or its endowments. It was not proved that in 1852, when the mosque was founded, there were any Soonee Mahomedans in the island other than Cutchees. There was no evidence that the words "the whole Mahomedan congregation in the island," as used in the earlier deeds of purchase, were meant to comprise any other classes than Cutchees. The respondents were admitted as a privilege and not as a right, and consequently could not question the appellants' exclusive right of management. On the assumption that the trust was for the whole Mahomedan congregation of the island it was contended that that trust was invalid and unenforceable. By the Civil Code, arts. 900, 910, and 937—and see Ordinance 22 of 1874, s. 16—donations in favour of establishments of public use can only take effect if they have been authorized by Imperial decree. Until incorporation under Ordinance 22 of 1874 there was no community of Mahomedans authorized to be beneficiaries. Declarations of trust for the whole Mahomedan congregation were not merely invalid at the time when they were created as being in disregard of the provisions of the Civil Code; they were also contrary to the provisions of the Penal Code: see Ordinance No. 6 of 1838,

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art. 210, which prohibits certain associations unless formed with the sanction of Government and subject to conditions imposed by it. See also art. 212 and Ordinance No. 13 of 1898, which for the first time authorized the Governor to exempt any religious sect from the penal provisions referred to. They referred to Laws of Mauritius, collected by Piggott and Thibaud, vol. iii. pp. 1057, 1076, 1077 ; vol. ii. p. 415 ; the Penal Code, art. 184, p. 410, and Ord. 13 of 1898, p. 484. Then the Civil Code speaks throughout of persons as the subjects of civil rights : see arts. 902, 1101, 1123, and 1832. Person is not defined in the Code, but the authorities are agreed that it includes artificial persons created by the sovereign power. The only person capable of being interested in the wakf properties was the incorporated society to which the appellants belong, which was called into existence in 1903. Reference was made to *Moreau* v. *Houdbert*, Sirey, 1861, part 1, pp. 615, 616 ; Laurent, Principes du Droit Civil Francais, vol. i. pp. 367, 368, 369, arts. 287, 288 (des personnes civiles) ; Fuzier Herman, Annotation to Code Civile, vol. i. p. 60, notes 1 to 13, under art. 7 of Code Civile (des personnes morales) ; vol. ii. p. 441, under art. 902, notes 3, 42—46, and 52. See also *Lacordaire's Case*, Sirey, 1870, part 1, p. 342 ; Sirey, 1875, part 2, p. 71 ; Sirey, 1858, part 1, pp. 225, 228 ; Dalloz, 1858, part 2, p. 49. The law of Mauritius with respect to civil or moral persons and to religious associations rests exclusively on the Civil Code as it stood in 1810 as modified by Ordinance 22 of 1874, and by that law, it was submitted, the respondents' actions would not lie.

J. E. Bankes, K.C., and *A. M. Bremner*, for the respondents, contended that the evidence shewed, as found by the Supreme Court, that the mosques and other properties in suit were bought on behalf of the whole Mahomedan congregation of the island and with moneys contributed or obtained by that congregation. So far as they were purchased by the Cutchees it was as agents for the whole congregation to be held on behalf of all its members. The whole congregation were creators of the wakf and as wakifs were entitled to the benefit and enjoyment of the mosque and other properties, and all were entitled to share in its management and administration. The evidence shewed that they had always

been maintained by the contributions of the Hallayes and Soortees as well as by the Cutchees, and that the management by the Cutchees was with the tacit assent of the congregation, and not by virtue of any exclusive right. The appellants had no right to include the properties in suit in the stock or fund of the society which they formed in 1903, or to attribute to themselves alone the administration and disposal of the same, without the participation of the respondents and other members of the congregation, or to constitute themselves trustees for that purpose. The transfer of the wakf properties to the new society was a breach of trust, illegal and wrongful, and accordingly the Supreme Court was right in setting aside both deeds. It was further contended that there was nothing contrary to the law of Mauritius in the whole congregation holding property and in their suing or being sued in respect thereof. Reference was made to Dalloz, Repertoire, vo. Societe, No. 112; vo. Action, No. 202; Sirey, 1884, part 1, p. 215; 1858, part 1, p. 226; 1868, part 2, p. 277; Dalloz, 1876, part 1, p. 115; 1887, part 1, p. 289 (note).

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

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SIR J. H. DE VILLIERS. These are consolidated appeals from a judgment of the Supreme Court of Mauritius setting aside two instruments by which provision was made for the management of the chief Mahomedan mosque at Port Louis and for the administration of certain properties held in connection therewith. The history of the mosque goes back to the year 1852. In that year nine Mahomedan merchants purchased two properties in Queen Street "for the whole Mahomedan congregation of the island of Mauritius," of which they declared themselves to be "les fondes de pouvoirs speciaux." By the deed of purchase the purchasers, declaring themselves to be the mandataries of the other Mahomedans, prohibited any alienation of the properties and declared that the land was to be devoted to no other uses than the erection of a building consecrated to the Mahomedan worship. On the properties so purchased a small mosque was erected about the year 1853. From time to time adjoining properties were bought by Mahomedan merchants,

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the purchasers declaring that they bought as well for themselves and in their own names as for the whole Mahomedan congregation. As the Mahomedan community increased in numbers and in wealth the mosque was enlarged and embellished, until it became the chief place of Mahomedan worship in the island. It is admitted on both sides that the worshippers in the mosque belonged to the school of Soonees, and that they mainly consisted of three classes, known as the Cutchee Maimans, the Hallaye Maimans, and the Soortees. These were all immigrants, or descendants of immigrants, from India, and they derived their distinctive names from the localities from which they came. Thus the Cutchees were inhabitants, or descendants from inhabitants, of Cutch, the Hallayes were descendants from inhabitants of Hallal, also called Kattiawar by some of the witnesses, and the Soortees were descendants from Mahomedans of Surat, or adjacent parts of Guzerat. At the time when the congregation was first formed and the mosque erected the overwhelming majority belonged to the Cutchee class. Merchants of that class took a great interest in their religion, and probably contributed the greater part of the funds required for the purchase of the land and the erection of the mosque, but, as already pointed out, they purported to act on behalf of the whole congregation. In 1877 two additional properties were bought, and in the deeds of purchase the purchasers—for the first time in the history of the mosque—declared that the purchases had been made on behalf of the Cutchees, and that a committee of Cutchees was to administer the property thus bought and all the other properties belonging to the mosque. Similar declarations were made upon the subsequent purchases of some additional properties. As to this, the learned judges in the Court below, in the reasons for their judgment, say: "This new departure—it has been admitted by counsel for the defendant Cutchees—was dictated by a fear that the Soortees, who were increasing in numbers, wealth, and power, might claim a right to interfere in the management of the mosque and its adjunct property under the broader terms of the previous purchases." The practice of purchasing on behalf of the Cutchees only was not, however,

consistently followed in the subsequent purchases, for on October 16, 1884, the attorney of one Aboo Taleb, a Hallaye, in purchasing an additional property at a judicial sale for 24,000 rupees, declared that the purchase was made "for and on behalf of the Mussulman congregation." Until the present dispute arose, the direction of the mosque and the administration of its affairs were practically in the hands of Cutchees only. In the year 1903 ninety-three Cutchees belonging to the congregation executed a notarial deed by which they formed themselves into a society consisting only of Cutchee Mahomedans, the objects of which were stated to be to assist distressed Cutchees and other poor persons of whatever religion, and to provide instruction for children. They further declared that they brought into the society in full ownership the different properties to which reference has been made, and they appointed a committee of management with very extensive powers, including those of selling and letting the properties of the society other than the mosque and its accessories and the land on which it stands. They also stipulated that none but Cutchee Mahomedans should become members of the society or have a voice in the management of its property. By another deed of the same date the same ninety-three Cutchees entered into an agreement for the administration of the mosque and the funds appertaining thereto, from which administration all but Cutchees were excluded. The society formed under the first-named deed was incorporated by proclamation issued by the Governor under the provisions of Ordinance No. 22 of 1874. Before the society was formed, some of the principal Hallaye members of the congregation were asked to join, but they refused, because as a condition of so joining they would have to class themselves as Cutchees, which they obviously could not do and because they disapproved of the manner in which it was proposed to deal with the assets set apart for the religious uses of the congregation. As to the Soortees, they were not asked at all to join in the execution of the deeds. After the deeds had been executed, separate actions were brought in the Supreme Court of Mauritius by Hallaye and Soortee members respectively of the congregation to have it declared that the societies formed by the deeds were null and void, and to have a scheme settled

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for the management of the religious foundation. The actions having been consolidated, the deeds were set aside in so far as they purported to give to the Cutchees the exclusive administration as of right of the mosque and its accessories, and a scheme was substituted for the portion thus set aside, by which three representative Soortees and one representative Hallaye were ordered to be added to the committee of seven Cutchees provided for by the deeds. Against that judgment the defendants have appealed.

The evidence taken in these cases has been most voluminous, but it has been so fully, carefully, and ably dealt with by the learned judges of the Court below that it will be unnecessary for their Lordships to do more than briefly refer to the leading facts. The outstanding fact in both cases is that the founders of the mosque drew no distinction between Cutchees, Hallayes, and Soortees, but devoted the property to the religious uses of the whole Mahomedan congregation. The majority have always been Cutchees, but from the first there were a few Hallayes, and, within a few years after the establishment of the congregation, some Soortees were added to their number, and they have considerably increased of recent years. The richest members of the congregation were undoubtedly the Cutchees, and they contributed individually in proportion to their means, but considerable contributions were made in the aggregate by Soortees as well as Hallayes. After a time a system was introduced by which a rate, " pour l'eglise," of two cents was levied on every bag of grain sold wholesale by leading merchants of the congregation. In this manner it came about that the Cutchees raised the greater part of the church funds, but some Hallaye merchants also raised money in that way. The burthen of the rate probably fell on the purchasers, who, for the greater part, were Europeans, but among the purchasers were also many Hallaye and Soortee members of the congregation. The money thus raised was not kept apart as a separate fund, but seems to have been mixed with the general fund of the mosque. As regards the administration of the affairs of the mosque, it was left in the hands mainly, if not entirely, of Cutchees, but their Lordships agree with the judges of the Court below that this was

done because they were leading merchants occupying a recognized position in the commercial world, and not because they belonged to any particular class of Mahomedans.

In this view of the facts, the question arises whether, by the law of Mauritius, the plaintiffs, as members of the congregation and habitual worshippers in the mosque, are entitled to be relieved against deeds which deprived them and all other Hallayes and Soortees, for all future time, of all share in the management of the mosque, and vested the ownership of the mosque and all properties accessory thereto in a newly-formed society from membership of which they were excluded. An objection was taken on appeal, which had not been raised on the pleadings, that the plaintiffs had no right to institute the action in the absence of His Majesty's Procureur and Advocate-General, who is alleged to exercise in the Colony functions corresponding to those of the Attorney-General in England as representative of the Crown and guardian of its rights and prerogatives. No authority was, however, cited before their Lordships to shew that, in a case like the present, the joinder of such a functionary was required by the law of Mauritius. The objection, if valid, ought to have been taken before the Mauritius Court, and it really was not pressed before their Lordships. As there is nothing to shew that any prerogatives of the Crown are prejudiced by the judgment, their Lordships are not prepared to advise that it should be disturbed merely on the ground that the Crown had not been made a party to the actions. The Governor has by proclamation incorporated the society called into being by the deeds, but if the deeds are not such as can be maintained consistently with the legal rights of the plaintiffs, the Crown would appear to have no interest in maintaining them.

Upon the question whether the plaintiffs have any rights whatever in respect of the future management of the affairs of the mosque, the defendants rely, in the first place, upon the provisions of the 210th article of Ordinance 6 of 1838. That article reads as follows :—" No association of more than fifteen persons of which the object shall be to meet every day or on fixed days for the consideration of any religious or political subject (pour s'occuper d'objets religieux ou politiques) can be formed unless

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with the sanction of the Government and under such conditions as the public authority shall deem necessary to impose on such society."

The 212th article imposes a penalty of 200 rupees for a contravention of the 210th article. The contention is that the congregation was a wholly illegal association, and that consequently none of its members could have any right of action in respect of any acts that are detrimental to their interests as such members. It is remarkable that such a contention should be set up after the congregation has been in existence for more than half a century, during which period no prosecution appears to have taken place against any of its members for having joined in an illegal association. It probably never entered the minds of the authorities that a congregation formed for the purposes of prayer and religious worship was necessarily an association the object of which was " pour s'occuper d'objets religieux ou politiques." Be that as it may, in the arguments of the defendants' counsel, which are fully reported in the record, not a word was said as to the illegality of the association in the sense of its being criminal. The argument there was—and this argument has been repeated before their Lordships—that under the Civil Code, which is in force in Mauritius, the technical right to hold property cannot be vested in a religious community which has not been authorized by the State, because without such authorization it has no legal existence. Now, although it is quite true that under the French law such a community does not constitute a " civil person," yet it has been held, according to Sirey (" Recueil General," 1858, p. 225), that such a community forms among the members of which it consists a society de facto which renders those forming part of it responsible for the engagements which they have made in its interest, whether those engagements result from contract or quasi-contract. This qualification shews that the rule laid down in the Code has not always been carried out to its logical conclusions. No case has been cited in which any French Court has refused, under circumstances analogous to the present, to grant relief to the aggrieved members of an unauthorized religious community against their fellow members. The position which has arisen in the present case is unique, and

it is no wonder that counsel for the defendants had to admit in the Court below that they could not find any law in Mauritius to meet the case. The defendants, in order to legalize their position as members of a religious community, had obtained a charter of incorporation, but in the deeds defining the rules of their new association certain other members of the congregation were excluded from membership, not because they were not de facto members of such congregation, but because they did not belong to that particular class which, owing to special circumstances, had, up to that time, had the almost exclusive management of the affairs of the mosque. The result of allowing these deeds to stand would be that, however the Hallayes or Soortees might hereafter increase, or the Cutchees might decrease, in numbers, wealth, and importance, the Cutchees will be entitled to dispose of all the property except the mosque proper, and the two other classes will have no voice whatever in the management of the mosque or of the properties accessory thereto. The defendants say that it was necessary to legalize the position of the congregation by reason of the difficulties necessarily attendant upon the administration of the immovable properties by an unincorporated body. But the only association which could claim to be legalized was the congregation on whose behalf the mosque had been founded. If a portion of the congregation chose to form a new association, they had no right to transfer all the property to such new association and exclude the rest of the congregation from membership and from participation in the management of the affairs of the mosque. If, therefore, the Supreme Court, in the exercise of its equitable jurisdiction, had set aside the deeds and gone no further, their Lordships would have had no hesitation in advising His Majesty that the appeals should be dismissed.

Unforfunately, however, the Court, in its laudable anxiety to effect a complete settlement of the dispute, set aside the deeds in part only, and for the portion thus set aside substituted a scheme which, pending the formation of an incorporated society of all Soonee Mahomedans, was to regulate the management of the affairs of the mosque. Under this scheme the committee of

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management was increased in number from seven to eleven, and it was ordered that of the four additional members three were to be representative Soortees and one a representative Hallaye. The Court, however, reserved the right of modifying the composition of the committee and system of administration as the Court might deem just or necessary from time to time, either proprio motu or upon application of any Soonee Mahomedan holding a licence to trade. The result is that the scheme of management upon which the existing charter of incorporation is based has been superseded in part only by another scheme the nature of which will vary as circumstances might, in the opinion of the Court, from time to time require. It is not quite clear from the judgment whether the charter of incorporation was intended to remain in force to the extent to which the deeds were upheld. If it was intended that the charter should remain in force with the variations introduced by the Court, the difficulty would arise that the Ordinance No. 22 of 1874, under which the charter was granted, expressly enacts that the rules and regulations embodied in any charter shall not be altered or repealed except by a certain proportion of the total number of members, and then only after confirmation by the Governor in Council. If it was intended that the charter should no longer have any operation, it is difficult to conceive how the judgment of the Court, establishing a fresh scheme of management, could legalize an unauthorized religious community. The Court admitted that it had no power to grant letters of incorporation, but the judgment practically attempts to legalize one scheme of management in substitution for another scheme, which had been authorized by charter. If the Court had contented itself with setting aside the deeds as null and void, the charter, which is founded on one of these deeds, would have become inoperative, but the judgment, as actually pronounced, would encounter innumerable legal difficulties in its execution. There is a further objection to the order, namely, that there is not sufficient evidence to shew that the number of members of committee allotted to the Hallayes and Soortees respectively is in due proportion to their numbers and importance, relative to the Cutchee members of the congregation. It was admitted by the learned judges that

until the date of the execution of the impugned deeds the Cutchee managers had satisfactorily administered the affairs of the mosque, and there seems no reason to fear that, if matters are replaced in statu quo ante, the affairs of the mosque will be maladministered. It would certainly be in the interest of all concerned that the question of future management should be placed on a satisfactory footing by means of an amicable settlement. If the members of the congregation, including Hallayes, Soortees, and Cutchees, could agree upon a scheme of management by which due effect is given to the relative importance of the three rival classes, there would probably be no difficulty in obtaining a charter of incorporation giving effect to the settlement. But until the parties themselves come to such an agreement, it is, in the view of their Lordships, impossible for the Court, with due regard to the existing law of Mauritius, to frame a scheme that is entirely free from legal objections.

The result is that their Lordships will humbly advise His Majesty that the judgment appealed from should be confirmed in so far as it cancels the two agreements of 1903 and in so far as it orders the defendants to pay the costs, but the appeal should be allowed in so far as the said judgment purports to make special provision for the administration of the mosque and appurtenances and the properties and revenue thereof.

The parties will respectively bear their own costs of these appeals.

Solicitors for appellants : *H. C. Barker & Son.*

Solicitors for respondents : *Armitage & Chapple.*

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June 16, 17, 23; *July* 27.

KALKA PARSHAD AND OTHERS . . . . . PLAINTIFFS;

AND

MATHURA PARSHAD AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Hindu Law—Remote Reversionary Heirs—Sister's Son—Priority of Heritable Right—Pedigrees—Indian Evidence Act, s. 32, *sub-s.* 5.

The immovable property of a deceased Hindu was claimed by the plaintiffs in right of their father, S. S., as the nearest reversionary heir to the deceased on the death of his widow in 1896. The Subordinate Judge found on the plaintiffs' pedigrees that S. S. and the deceased were descended from a common ancestor seven degrees removed and that S. S. was the preferential heir.

The Judicial Commissioner dismissed the suit, finding that the appellants had made no attempt to support the finding of the Court below and that they were not entitled under the pedigree filed by the defendants :—

Held, that the decree of the first Court must be affirmed, the evidence being sufficient to maintain it, and there having been misapprehension by the Court of Appeal as to the absence of attempt to support it.

Held, also, with regard to the plaintiffs' pedigrees, that although they were not family records handed down from generation to generation and added to from time to time, they were nevertheless admissible in evidence so far as they consisted of declarations shewn to have been made or adopted ante litem motam by deceased members of the family touching the family reputation or tradition on the subject of its descent. To render a statement inadmissible as having been made post litem motam the same thing must be in controversy both before and after it is made.

APPEAL from a decree of the Judicial Commissioner (April 17, 1906) reversing a decree of the Subordinate Judge of Undo (December 16, 1903).

The question decided was whether upon the evidence and as matter of law the appellants had established their title to the property in suit, which had admittedly belonged to one Gur Sahai, who died about 1867, and was succeeded by his widow, Mussammat Parbati, who died on March 22, 1896. After her

* *Present*: LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

death the respondent Mathura Parshad took possession, as Gur Sahai's sister's son, of the property, and obtained mutation of names in his favour in the Revenue Court.

On May 20, 1901, the appellants sued as paupers in ejectment on the allegation that, after the death of Mussammat Parbati, their father, one Sheo Sahai, who died on September 22, 1899, was the nearest surviving heir of Gur Sahai, the last male owner of the property, and, as such, entitled to obtain possession thereof from Mathura Parshad, who was made the first defendant to the suit ; the other defendants being his transferees.

The Subordinate Judge found that the plaintiffs had proved the pedigree filed by them ; that at the death of Mussammat Parbati there was no heir living who was nearer to her husband, Gur Sahai, than Sheo Sahai, the father of the plaintiffs ; and that as against the latter the first defendant had no right to the property, and the transfers made by him were clearly invalid. Defendant No. 1 can only succeed as bandhu in the absence of heirs of sapinda and samanodaka class.

With regard to the admissibility of the three pedigrees filed by the plaintiffs and specifically mentioned in their Lordships' judgment the Subordinate Judge held that all three were admissible as having been drawn up and filed before the controversy as to succession arose.

On two appeals separately filed by some of the appellants, the Court of the Judicial Commissioner examined in detail the documentary evidence of the plaintiffs and decided that the greater portion of it was not admissible in evidence. With regard to the oral evidence of the plaintiffs to prove the pedigree filed by them, the Appellate Court held that it was of as little value as the documentary evidence, and remarked that at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. They further recorded that " the only contention was that, accepting the pedigree filed by the defendant Mathura Parshad, the plaintiffs are heirs of Gur Sahai, as, according to it, they are samanodakas, and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

With reference to this contention, various Hindu law books

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and text-books on Hindu law were considered by the learned judges, and they held, on the authority of the passages cited therefrom, that, according to the pedigree admitted by the first defendant, Sheo Sahai, the father of the plaintiffs, was a samanodaka of Gur Sahai, being sixteenth in descent from the common ancestor, Chajmal Das, Gur Sahai being fifteenth in descent from him ; but they found that four other persons were also alive on the death of Mussammat Parbati, and were related to Gur Sahai in the same degree as Sheo Sahai, and that these were therefore entitled each to a fifth share in the property in suit.

The first decree of the Appellate Court was in favour of the plaintiffs as respects one-fifth of the property claimed and dismissed the suit as respects the other four-fifths. In its judgment it rejected the three pedigrees. With regard to the third mentioned in their Lordships' judgment, Shankar Sahai's suit was brought in 1898 and the pedigree filed therein was post litem motam. With regard to the second, though filed prior to Parbati's death, Sheo Sahai, who was a writer in the office of the tehsildar, probably foresaw that there would be a dispute about the succession to Gur Sahai's estate, and not impossibly was preparing for it. And "when Sundar Lal, one of the plaintiffs, made a charge of waste against Mussammat Parbati, she denied that he had anything to do with her property and said that he had made the application with the object of establishing a claim to it. This was in 1891, and the question of succession had therefore arisen at that time, so that the pedigree filed by Sheo Sahai in 1892 would not be admissible in evidence." With regard to the first it said: "The pedigree which purports to have been written in 1872 by Maharaj Bahadur is said to have been given to Kalka Parshad by Sheo Narain for the purpose of a criminal case, but Maharaj Bahadur is still alive, and there is no evidence that Sheo Narain dictated it. Moreover, the evidence as to its being given to Kalka Parshad is unsatisfactory."

Upon an application for review the Court reconsidered its decision, found that the defendants' pedigree disclosed five persons as equally with Sheo Sahai related to Gur Sahai, and therefore that in any event the plaintiffs were only entitled to one-sixth, and held, on a further examination of the authorities

that Sheo, being sixteenth in descent from the common ancestor, was not a samanodaka of Gur Sahai and not entitled to succeed, and that Mathura Parshad, being a sister's son, was a bandhu and a preferential heir.

De Gruyther, *K.C.*, and *Kyffin*, for the appellants, contended that they, as representing their father, Sheo Sahai, were entitled to succeed to the estate in suit. On the death of Gur Sahai, the last full owner, Parbati Koer, his widow, succeeded, and on her death Sheo Sahai was the next reversionary heir, and in any case was a nearer heir than the respondent Mathura Parshad. The Hindu law of succession applicable to the case of remote heirs is to be found in Mayne's Hindu Law, 7th ed. p. 679, s. 501. With regard to the proof of the appellants' pedigree the reasoning of the Subordinate Judge as to its sufficiency was relied upon, and the case of *Debi Pershad Chowdhry* v. *Radha Chowdhrain* (1) was referred to. See also the Evidence Act (I of 1872), s. 32, sub-s. 5, and s. 50. The oral evidence was referred to in corroboration of the pedigree, and it was contended that there was no proof given of the respondents' pedigree. There was nothing in what took place before the Judicial Commissioners, when properly understood, to preclude the appellants from relying on what was submitted to have been the conclusive evidence in their favour admitted by the first Court.

Ross, for the first and second respondents, contended that the appellants were estopped by what took place before the Judicial Commissioners from relying upon the evidence given before the trial judge. No attempt was made to support in appeal the finding of the first Court, and on an application for review made under s. 623 of the Civil Procedure Code the Appellate Court adhered to its view, with a full knowledge of what had passed, that the appellants had abandoned their contention of being exclusively entitled. It was further contended that both on the evidence and as matter of law the appellants had failed to prove their title. The pedigrees put forward by them were rightly held to be inadmissible under s. 32, sub-s. 5, of the Evidence Act. The oral evidence was not to be relied upon. Mathura Parshad,

(1) (1904) L. R. 31 Ind. Ap. 160 ; I. L. R. 32 Calc. 84.

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as sister's son, was a bandhu entitled to inherit in the absence of nearer heirs and was in possession. The appellants had failed to prove a title to eject.

De Gruyther, *K.C.*, in reply.

The judgment of their Lordships was delivered by

LORD ATKINSON. The suit out of which this appeal arises was instituted by the appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immovable property in the plaint described, of which Gur Sahai died possessed about forty years ago.

Gur Sahai was succeeded in the possession and enjoyment of the property by his widow, Mussammat Parbati, who died on March 22, 1896. Sheo Sahai died on September 22, 1899.

Tha principal defendant, the respondent Mathura Parshad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Mussammat Parbati, still retains it, and succeeded in obtaining a mutation of names in his own favour.

Only two questions were discussed on the hearing of the appeal, and it is only necessary for its decision that their Lordships should deal with these. They are—

1. Is it open to the plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu law, the heirs of Gur Sahai ?

2. If it be open to them to do so, is the evidence, legally and properly admissible, given before the Subordinate Judge who tried the case in the first instance sufficient to establish the fact of their alleged heirship ?

The course the proceedings took before the Court of the Judicial Commissioner is somewhat peculiar. The plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that

the plaintiffs were, through Sheo Sahai, heirs of Gur Sahai. Mathura Parshad filed a pedigree which shewed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das; thatGur Sahai stood in the fifteenth degree from the common ancestor, Chajmal Das, and Sheo Sahai in the sixteenth degree; and he contended that, under the Hindu Law, heirships did not extend beyond the fourteenth degree, and that therefore he (Mathura Parshad), though only a sister's son, was to be preferred as heir to such remote relations.

No evidence whatever was given to prove the latter pedigree. Indeed it was abandoned by the respondents on this appeal. Yet the Court of the Judicial Commissioner, finding that it shewed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu law permitted them, notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the defendants Nos. 1 and 2 applied under s. 623 of the Civil Procedure Code for a review of this judgment, setting forth amongst other things—

1. That the Court had held that the pedigrees set up by the plaintiffs were not proved, and that they were therefore not exclusively entitled to the property in suit.

2. That the question whether persons in the sixteenth decree could be preferred to Mathura Parshad, the nephew, was not allowed by the Court to be fully argued.

On this application the Court of the Judicial Commissioner decided that the Hindu law forbade what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor, on the ground that he could scarcely be said to be a relation at all, and that therefore the nephew Mathura Parshad should be considered as nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application, made no reference to

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the first point which they had decided, namely, that the pedigree set up by the plaintiffs was not proved.

In the first judgment of the Court they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal had been challenged by the defendants' advocate, who contended that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the evidence, written and oral, adduced by the plaintiffs, giving their reasons for holding that the documents were inadmissible and the witnesses unworthy of belief, and they wind up this examination with the passage on which the respondents rely as sufficient to shut out the plaintiffs from attempting to sustain the decision of the Subordinate Judge. It runs as follows: "The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant Mathura Parshad, the plaintiffs are heirs of Gur Sahai, as, according to it, they are samanodakas, and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the plaintiffs' advocate had formally admitted he could not support that judge's finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding on nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought to recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the plaintiffs is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the plaintiffs are by the

statement contained in this paragraph estopped from endeavouring to sustain on this appeal the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely, (1.) a pedigree purporting to have been written by one Maharaj Bahadur in 1872; (2.) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from the lands sued for in this action, in which Sheo Sahai was plaintiff and Kesho and others defendants; (3.) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shankar Sahai was plaintiff and Fazal Husain and others were defendants. The Subordinate Judge, though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this appeal has arisen is but a stage in the dispute which arose on the death of Mussammat Parbati in 1896, admitted each of these pedigrees in evidence, and the plaintiffs relied strongly upon them. They are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them in the reverse order, the last is inadmissible, having been made post litem motam. The second is indorsed, "(Signed) Sheo Sahai, plaintiff, by the pen of Sunder Lal, special agent," and is on the evidence of Sunder Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Mussammat Parbati, in the absence of Sunder Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting-place, she had said, "I have no kinship with him, nor am I on visiting and dining terms with him as a

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fellow-caste man. He has no concern with my proprietary interest (hakkiat). . . . . The plaintiff's (Sunder Lal's) father and his co-sharers have wasted their shares in the hakkiat." But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement inadmissible on this ground the same thing must be in controversy before and after the statement is made: *Freeman* v. *Phillips* (1); *Shrewsbury Peerage Case* (2); *Duke of Devonshire* v. *Neill.* (3) In their Lordships' opinion, having regard to the evidence of Sunder Lal and of the other witnesses examined for the plaintiffs, this pedigree was clearly admissible.

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiffs' family, who was, however, not examined as a witness. According to the evidence of Kalka Parshad, it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894-1896 (the precise date is not fixed) as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings instituted under s. 323 of the Indian Penal Code in the case of *In re Baiju and others* v. *Sundar Lal and Durga Parshad.* It was thus adopted by Sheo Narain, is not shewn to have been made post litem motam, and is therefore, in their Lordships' opinion, admissible.

These pedigrees disclose that Gur Sahai and Sheo Sahai are descended from a common ancestor, Partab Mal, one of the sons of Chajmal Das, the first through his son Har Parshad, the second through his son Ram Ghulam, each being six degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely, Kalka Parshad, Mohabbat Rai, and Sunder Lal, prove pedigrees substantially identical with that signed by Sheo Sahai, filed in 1892 or 1894, and others, such as Hazari Lal, prove important portions of it; while Lalta Parshad, one of the defendants' witnesses, deposed as follows: "Sheo Sahai also belongs to the

(1) (1816) 4 M. & S. 486, 494, 497. (2) (1857) 7 H. L. C. 1, 22.
(3) (1876) 2 L. R. Ir, 132.

family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion both [i.e., Madho Ram and Sheo Sahai] are equally related, i.e., in the same degree." And Sri Kishen, another witness for the defendants, a priest of the family of Sita Ram, deposed: "Sheo Sahai and Sheo Narain descend from Ram Ghulam, Gur Sahai descends from Har Parshad; Ram Ghulam, Har Parshad, and Shiam Das are sons of Partab Mal."

This evidence precisely accords with the above-mentioned pedigrees numbered 1 and 2, proves, in fact, some of the most important steps in them, and is therefore the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain mohalla sarai has been enjoyed. The family reputation is that this sarai was founded by Sundar Das (one of the brothers of Partab Mal), who died childless. If the pedigrees of 1872 and 1894 be correct, then half, or an eight annas share in this sarai, should be found in the enjoyment of the descendants of Partab Mal, and the remaining eight annas share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That, according to the evidence of Raghunath Parshad and Kalka Parshad, is precisely what is found. Two annas shares were enjoyed by Sheo Sahai, Sheo Narain, and Gur Sahai respectively; a two annas share by Sheo Dyal and Ram Dyal (who died childless) jointly; and the remaining eight annas by Sita Ram, Gur Parshad, Ram Narain, Shankar Sahai, and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the defendants, from Shiam Das, and not from Partab Mal, the whole eight annas share of Partab Mal must, in the events which have happened, have come to Mussammat Parbati. Sita Ram, one of the defendants, gives in detail the distribution of an eight annas share in the sarai coming into the hands of his branch of the family and states that the sarai is joint property. No evidence is given to contradict that of Raghunath Parshad and Kalka Parshad as to the persons amongst whom the share of Partab Mal in the sarai is distributed.

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It was argued by Mr. Ross, on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree, as deposed to by Kalka Parshad. No doubt there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are therefore of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous, and that its decrees should therefore be reversed, with costs, and this appeal allowed. They will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Solicitors for appellants : *Young, Jackson, Beard & King.*

Solicitors for respondents : *Rawle, Johnstone & Co.*

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June 16;
July 1.

SANKARALINGA NADAN AND OTHERS . . APPELLANTS; -
AND
RAJA RAJESWARA DORAÏ AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Right of Worship in Temple—Nadar or Shanar Caste—Proof of Custom to exclude Shanar Caste from Temple in suit—Compromise by Trustee Plaintiff after obtaining a Decree—Breach of Trust.

In a suit by the hereditary trustee of the temple in suit, dedicated to the worship of Shiva, to exclude the appellants, representing the Nadar or Shanar caste, from entering and worshipping therein, there was a concurrent finding of fact that the presence of persons of that caste was repugnant to the religious principles of the Hindu worship of Shiva and

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* *Present* : LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

to the sentiments of the caste of actual worshippers, and was contrary to custom in the temple :—

Held that, as the plaintiff had proved that by custom the appellants are not among the people for whose worship the temple exists, the suit was rightly decreed.

The plaintiff having, after a decree in his favour by the first Court, applied to alter the judgment so as to defeat his own action, certain new plaintiffs were added to enforce the rights of the worshippers :—

Held, that the High Court in affirming the decree had rightly applied the principles applicable to a trustee who betrays his trust by surrendering a decree.

APPEAL from a decree of the High Court (February 14, 1902) affirming a decree of the Subordinate Judge of Madura (East) dated July 20, 1899.

The suit was brought by the Rajah of Ramnad, as the hereditary trustee of the Hindu temple of Meenatchi Sundareswara, situate in the town of Kamudi, for a declaration that the members of the Shanar community are not entitled to enter the temple, and for an injunction restraining them from doing so and for a sum of Rs. 2,500 as damages. The defendants were Shanars and were sued as representing the whole community of Shanars, resident in or about Kamudi, under Civil Procedure Code, s. 30. The defendants pleaded, inter alia, that the members of their community have a right to the use of the temple and to participate in the worship therein. The Subordinate Judge made the declaration and injunction prayed for and awarded Rs. 500 as damages. On appeal the High Court affirmed the decree with costs.

The findings of the Subordinate Judge were as follows :— (1.) That the Nadars were not a distinct and separate community from the Shanars, whose hereditary occupation was the cultivation of the palmyra tree and cocoanut palm, and the extraction and manufacture of their juice; (2.) that persons belonging to that class were prohibited from entering the plaint temple by the rules of worship therein observed ; (3.) that a custom was proved excluding Shanars from entering the said temple; (4.) that the acts of sacrilege alleged to have been done by the appellants on May 14, 1897, were not done by them, and that the plaintiff's case was in this respect false; (5.) that the Civil Courts could take cognizance of the present suit ; (6.) that in consequence of

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the entry into the temple purification was necessary, and that the defendants ought to pay Rs. 500 for this purpose.

While the appeal was pending before the High Court, and on July 23, 1901, a petition, signed by the plaintiff and the appellants, was preferred on behalf of the latter, stating that the parties had effected a compromise of the matters in suit, and praying that the compromise might be recorded and a decree passed in accordance therewith. The agreement of compromise, a copy of which was annexed to the petition, was to the following effect :—"First, the plaintiff shall not exclude the defendants and their caste people from exercising their right of free access to and of worshipping in the said temple of Kamudi, but shall allow them to enjoy and exercise their said right of free access and worship in the same manner and to the same extent as such rights are enjoyed by Vellala, Chetty, and other Sudra sects of the Hindu community. Secondly, the defendants shall enjoy and exercise their said rights in the same manner and to the same extent as the aforesaid sects of the Hindu community enjoy them, and that they have no higher rights of access and worship in respect of the temple, and that the defendants are not liable to pay the plaintiff any sum of money by way of damages; and, thirdly, each party shall bear their own costs of the suit and the appeal. It is further agreed that the plaintiff and the defendants shall present a joint petition or petitions to the High Court, praying that the said decree on the file of the Subordinate Court of Madura (East) be reversed, and that a decree should be passed in accordance with the terms of this agreement."

Thereupon two of the worshippers of the temple in question, and also the infant son and heir apparent of the original plaintiff, by his mother and next friend, were joined as party respondents to the appeal, in order that they might oppose the petition of compromise, to which they took various objections which were stated in the evidence filed in support of their applications.

When the petition of compromise came on for hearing it was supported by the appellants alone, and opposed not only by the newly-joined plaintiffs, but also by the original plaintiff, who expressed the desire to withdraw from the compromise. The petition was dismissed on the ground that the agreement of

compromise put forward was not a lawful agreement or compromise within the meaning of Civil Procedure Code, s. 375. The learned judges said :

"It has been judicially established before the Subordinate Judge that the defendants 'belong to a class which under custom and the shastras are prohibited from entering the plaint temple,' and that their having done so caused defilement, which necessitated the purificatory ceremonies.

"That finding is binding on the plaintiff as well as on the defendants, and he cannot take upon himself to say 'I have made further inquiries. I am satisfied that the finding of the Court is wrong. I shall, therefore, allow the Shanars to enter the temple.'

"To do this would be to ignore and alter the fundamental character and uses of the temple as ascertained by judicial authority. It is not in the power of the trustees to do this. This principle was laid down by Eldon L.C. in the case of *Attorney-General* v. *Pearson* (1) in these words: 'Where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question than through the medium of an inquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon inquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded, or to say to the remaining members, "We have changed our opinions, and you, who assemble in this

(1) (1817) 3 Mer. 353, 400.

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place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions." '

"These words, no doubt, were used with reference to the regulation of religious trusts in England by the Court of Chancery, but we apprehend that, mutatis mutandis, the Court will be guided by the same principles in this country. Where an institution exists for the purpose of religious worship, but the exact form of worship, or the class for whose benefit it was established, cannot be discovered from the instrument creating the trust, or where, as in the present case, there is no such instrument, the Court can find no other means of deciding those questions than through the medium of an inquiry into what has been the usage of the worshippers in respect thereto, and, if the usage is a lawful one, it is the duty of the Court to support that usage on the suit, legally instituted, of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded, or to say to the other worshippers, 'We have changed our opinions, and you, who resort to this place for the purpose of worshipping in the customary manner, shall no longer enjoy the benefit intended for you unless you conform to the alteration which has taken place in our opinions, even to the extent of submitting to the presence of other worshippers who are prohibited by custom and the shastras from entering into the temple.' It is not in the power of any trustee to say this to the other worshippers in a temple. On the contrary, it is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is, in our opinion, guilty of a breach of trust, and still more so if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it.

"The defendants, however, contend that, as the decree of the Subordinate Judge in this case is under appeal, the appeal opens up the whole question as to whether the Shanars are or not prohibited from entering into and worshipping in the temple and there is no binding decision as to what the usage is, and

therefore no breach of trust on the first plaintiff's part in making the agreement to admit the Shanars to the temple.

" This contention, it seems to us, rests on a fallacy and is invalid. The appeal, no doubt, opens up the whole question for the decision of the Appellate Court, but pending that decision the decree of the Subordinate Judge does not cease to be binding on the parties. Pending that decision they are just as much bound by the decree as if there was no appeal. In view, then, of the finding of the Subordinate Judge that the Shanars are prohibited by custom and by the shastras from entering the plaint temple, we must hold that the proposed compromise by the first plaintiff involves a breach of trust on his part, and is therefore not a lawful compromise within the meaning of s. 375 of the Code of Civil Procedure."

The High Court thereafter dismissed the appeal, finding that " there can be no doubt that the evidence adduced by the plaintiffs as to the custom of the plaint temple is far superior in weight and credibility to that adduced by the defendants and is in fact sufficient to establish the contention of the plaintiffs that the Shanars are by custom prohibited from entering the plaint temple."

The judgment then proceeded : " A great deal of evidence has been adduced with regard to the rights of the Shanars to enter Hindu temples, other than the plaint temple, whether in other parts of the Madura district or in other districts of the Presidency. There is some evidence on defendants' side that Nadars have been allowed to enter certain Hindu temples in the Tanjore and Coimbatore districts, and at Chidambaram in the South Arcot district, and also at Palani in the Madura district, but there is an overwhelming preponderance of evidence on the plaintiffs' side against the existence of any such right in the temples generally in the Madura district. . . . . So far as an inference with regard to the custom in the plaint temple can be drawn from the practice in other Sivaite temples of the Madura district, the evidence on this point is strongly in favour of the plaintiffs' contention. The evidence adduced is too meagre to establish any custom in regard to the practice of temples at a distance from Madura, and in any case the inference to be drawn

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from such practice, if established, grows weaker in proportion to the distance from the plaint temple.

"A great mass of evidence on both sides was adduced with reference to the issue as to whether the defendants belong to a class inferior to the other classes that worship there; but, as already remarked, this question is relevant only in so far as it leads to an inference with regard to the alleged prohibition against the Shanars entering the plaint temple. The evidence is, as might be expected, conflicting, but there can be no doubt whatever as to its general result. There is no sort of proof, nothing, we may say, that even suggests a probability, that the Shanars are, as the defendants contend, descendants from the Kshatriya or Warrior caste of Hindus, or from the Pandiya, Chola, or Chera race of kings, and the futile attempt of the Shanars to establish the connection has brought well-deserved ridicule on their pretensions. Nor is there any distinction to be drawn between the Nadars and the Shanars. Shanar is the general name of the caste, just as 'Vellala' and 'Maravar' designate castes. 'Nadar' is a mere title, more or less honorific, assumed by certain members or families of the caste, just as Brahmins are called Aiyars, Aiyangars, and Rows. All 'Nadars' are Shanars by caste, unless, indeed, they have abandoned caste, as many of them have by becoming Christians. The Shanars, as a class, have from time immemorial been devoted to the cultivation of the palmyra palm and to the collection of its juice and the manufacture of liquor from it. Their own local traditions connect them with the toddy drawers of Ceylon, whence the Tiyans, or toddy drawers of the west coast, are also supposed to have immigrated. There are no grounds whatever for regarding them as of Aryan origin. Their worship was a form of demonology, and their position in general social estimation appears to have been just above that of Pallas, Pariahs, and Chucklies (who are on all hands regarded as unclean and prohibited from the use of the Hindu temples), and below that of Vellalas, Maravars, and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples. In process of time many of the Shanars took to cultivation, trade, and money lending, and to-day there is a numerous and prosperous body of Shanars who

have no immediate concern with the immemorial calling of their caste. In many villages they own much of the land and monopolize the bulk of the trade and wealth. With the increase of wealth they have, not unnaturally, sought for social recognition and to be treated on a footing of equality in religious matters.

"In a few individual cases in Tanjore and other districts away from Madura they appear to have, to some extent, succeeded, but the general attempt of the caste to force itself to an equality with the better castes in social and religious matters has been fiercely resisted in the southern districts, and especially in Madura, where serious rioting and loss of life have resulted. The general result of the oral evidence as to the position of the Shanars in the social scale, as above stated, is abundantly borne out by all the best authorities who have written on the subject. Extracts from these are given in paragraph 59 of the Subordinate Judge's judgment. The reference to the Abbe Dubois' work is inaccurate, but the other extracts are to much the same effect. We refer to a few of them. In the official report on the census of 1871 (exhibit L) it is stated: 'The Shanar people, in whatever district they may be found, are clearly a non-Aryan people. The relations of the sexes and their religious development are just those of all aboriginal people. In Tinnevelly and Canara they are chiefly devil-worshippers. In Malabar they have hardly any religion at all, beyond the worship of some local deities. They are chiefly classed as Sivaites 68·3 per cent., but 24·4 per cent. are nominally Vishnuvites. They have their own gurus or priests in the Sivaite sects, but Brahmins officiate for the Vishnuvites'; and again, 'it has been ascertained that many of the Shanars of Tinnevelly returned themselves as Kshatriyas, a position in the caste system which they have no claim to.'

"In Baierlein's 'Land of the Tamilians,' published in 1875 (exhibit M), it is stated: 'It was amongst this simple race of palmyra farmers, the Shanars, some of whom also cultivate the land, that Christianity has celebrated her most important victories in India. Living at the southern extremity of India and possessing only a barren country, they were not much affected either by the Brahmin immigrations or by the Mahomedan sway. The Brahmins suffered them to drag their

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idol cars, but did not permit them to enter the temples. In this way they retained their own gods and their own worship. Their gods were demons, with an influence for evil only.'

"In Garrett's 'Classical Dictionary of India,' 1871 (exhibit K), the Shanars are described as 'a low caste very numerous in Tinnevelly, whose hereditary occupation is that of cultivating and climbing the palmyra palm, the juice of which they boil into a coarse sugar. This is one of those occupations which are restricted by Hindu usage to members of a particular caste. The majority of the Shanars confine themselves to the hard and weary labour appointed to their race; but a considerable number have become cultivators of the soil, as landowners or farmers, or are engaged in trade. They may in general be described as belonging to the highest division of the lower classes or the lowest of the middle classes; poor, but not paupers; rude and unlettered, but by many degrees removed from a savage state. Demonolatry, or devil-worship, is the only term by which the religion of the Shanars can be accurately described.'

"In Sir W. W. Hunter's 'Gazetteer of India' (exhibit U), 1887, we read: 'The Shanars are a low caste, living solely by the cultivation of the palmyra palm. They claim (perhaps with justice) to be the original lords of the soil. Christian missions have been especially successful among them. Devil-worship is common, especially among the Shanars. Tinnevelly has been less influenced by pure Hinduism than other districts. Some Brahmins have even taken up the local devil-worship.'

"In the 'Manual of the Tanjore District' (exhibit Q), compiled by the order of Government in 1883, we read: 'Shanars, fishermen, Oddars, Kuravars and Tombars, all held in about the same degree of exclusion, none of them being allowed to enter the houses of caste people, temples or choultries.'

"Again Dr. Caldwell in his 'Dravidian Grammar,' page 77, says: 'In Northern India, the Sudra is a low caste man; in Southern India he ranks next to the Brahmin, and the place which he occupies in the social scale is immeasurably superior, not only to that of the Pariahs and agricultural slaves, but also to that of the unenslaved low castes, such as the fishermen and he cultivators of the cocoanut and the palmyra palms.'

"These and the other extracts from various writers which have been filed as evidence in the case give no support to the pretensions of the Shanars. On the contrary, they go a considerable way to suggest that the Shanars are not likely to have a right by immemorial custom to worship in Sivaite temples, but are rather likely, from their low original occupation and social estimation, and the demonological character of their worship, to be excluded from such temples. The Shanars admittedly have a temple of their own in Kamudi dedicated to Subrahmania Badrakali, and there are many other such temples elsewhere.

"Another matter from which an inference as to the custom of the temple may well be drawn is that referred to in the fifth issue, which runs as follows: 'Whether there are shastras prohibiting the defendants from entering and worshipping in the plaint temple.'

"The Subordinate Judge has examined this question at length, and his conclusion is that, according to the Agama shastras which are received as authoritative by worshippers of Shiva in the Madura district, entry into a temple where the ritual prescribed by these shastras is observed is prohibited to all those whose profession is the manufacture of intoxicating liquor and the climbing of palmyra and cocoanut trees. No argument was addressed to us to shew that this finding is incorrect, and we see no reason to think that it is so. It might, of course, be that the local custom differed from the rule laid down by the shastras, but, in the absence of evidence, the inference to which the shastras would lead is that Shanars are prohibited, owing to their hereditary caste occupation, from entering the Sivaite temples, and we have already seen that this is also the conclusion to be drawn from all the other evidence in the case. No doubt many of the Shanars have abandoned that occupation and have won for themselves, by education, industry, and frugality, respectable positions as traders and merchants and even as vakils and clerks, and it is natural to feel sympathy for their efforts to obtain social recognition and to rise to what is regarded as a higher form of religious worship; but such sympathy will not be increased by unreasonable and unfounded pretensions,

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and in the effort to rise the Shanars must not invade the established rights of other castes. They have temples of their own, and are numerous enough and strong enough in wealth and education to rise along their own lines and without appropriating the institutions or infringing the rights of others, and in so doing they will have the sympathy of all right-minded men, and, if necessary, the protection of the Courts.

"The only other question is as to the remedy to which the plaintiffs are entitled in the present case. There can be no doubt but that the defendants did enter the temple notwithstanding the protests of the temple authorities on May 14, 1897, and that, as purificatory ceremonies were thereby rendered necessary, the plaintiffs are entitled to damages. We do not think that the sum of Rs. 500 awarded by the Subordinate Judge is excessive. Plaintiffs are also entitled to the declaration and injunction given by the Subordinate Judge in order to prevent a recurrence of the trespass."

De Gruyther, K.C., and *Kyffin*, for the appellants, contended that the decree of the High Court ought to be reversed. They contended that the compromise filed in the High Court was binding on the respondents and ought to have been enforced. Reference was made to s. 375 of the Civil Procedure Code, and it was contended that the compromise was valid within the meaning of that section and as being within the powers of the plaintiff as trustee acting bona fide. The Courts wrongly held that the Nadars and Shanars belong to the same caste and that it was a degraded one; also that a custom of exclusion was proved. Even if proved it was invalid in law as unreasonable. If concurrent findings of fact in this case cannot be disturbed, the decree, it was contended, was too general in its terms, and its operation ought to be confined to the actual parties defendant to the suit.

The respondents did not appear.

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July 1.

The reasons for the report were delivered by

LORD ROBERTSON. The question between the parties is whether the appellants and the caste to which they belong have

legal right to enter and worship in a temple at Kamudi. This temple is dedicated to the worship of Shiva, and the customary ceremonies of Hindu worship are there carried on. It is common ground between the disputants that the appellants represent a caste called the Nadar or Shanar caste. It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple. Both Courts in India have decided against the appellants, the judgment of the Subordinate Judge discussing the question in great detail and with much research, and the High Court at Madras resting their decision upon extremely comprehensible and cogent grounds.

The controversy touches, but does not involve, delicate and abstruse questions of Hindu religious doctrine. In the view of their Lordships it admits of decision upon a much more palpable and limited range of facts.

First of all, the appellants, as matter of fact, worship by themselves in a temple of their own. Second, the result of the evidence is a complete failure to prove any resort by persons of the appellants' caste to the temple in dispute. Those two facts not merely negative the case of the appellants that they "have been from time immemorial . . . . participating in the pooja and worship" in the disputed temple, but they make easy the respondents' further contention that this separation in worship between the two classes was not accidental or voluntary, but rested on a deeper ground.

The evidence has been admirably analysed by the High Court, and their appreciation of the quality of the evidence on the one side and on the other, concurring as it does with that of the Subordinate Judge, is entitled to the greatest weight.

The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to shew that there were inconsistencies in the respondents' treatment of the appellants in other respects. All this, however, as matter of theological argument, is too

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rationalistic; while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that by custom the appellants are not among the people for whose worship this particular temple exists.

Their Lordships have spoken of "the respondents" generally; but it is necessary to note the episode in the proceedings euphemistically described as "the compromise." The original plaintiff in the suit was the rajah, who was the hereditary trustee of this temple, which was the temple of one of the villages in his zemindari. After the case had been decided in his favour by the Subordinate Judge, this person thought fit to profess that he now saw that he and the judge were wrong; and he asked that the judgment should be altered, so as to defeat his own action. A very sordid motive for this surrender was specifically asserted and has not been disproved. The Court, on being applied to, very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by this time convalesced). The principles applicable to the case of a trustee who thus betrays his trust by surrendering a decree have been well stated and applied by the High Court.

For these reasons their Lordships, on June 16 last, agreed humbly to advise His Majesty that the appeal ought to be dismissed, and ordered the appellants to pay the costs of the appeal.

Solicitor for appellants: *Douglas Grant.*

Solicitors for respondents: *Chapman, Walker & Shephard.*

PANDIT GAYA PARSHAD TEWARI . . . PLAINTIFF;
AND
SARDAR BHAGAT SINGH AND ANOTHER . . DEFENDANTS.

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June 17;
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ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Action for Malicious Prosecution—Damages—False Report to the Police by Defendants.

In an action for damages for malicious prosecution it is not in all cases necessary to shew that the defendant is the person who actually prosecutes. Where the defendant has given to the police a report which is false to his knowledge, and results in a prosecution by them, and has taken a principal part in the conduct of the case both before the police and the magistrate, the remedy provided by this form of action is available to an innocent plaintiff aggrieved by an unfounded charge.

APPEAL from a decree of the Court of the Judicial Commissioner (December 14, 1905) reversing a decree of the Subordinate Judge of Bahraich (July 31, 1905).

The question decided was whether on the facts found, which are detailed in the judgment of their Lordships, the respondents are liable in law to an action for damages for malicious prosecution.

To an action so brought the respondents filed a written statement resisting the claim on the following grounds :—

Paragraph 11. Defendants did not institute any criminal prosecution, and were mere witnesses for the prosecution.

Paragraph 12. Defendants as witnesses were justified in making the statements they did in the Criminal Court, and no suit can legally be brought against them.

Paragraph 13. The prosecution was not malicious and without reasonable and probable cause, nor did it arise from any illegitimate motive.

The Subordinate Judge decided that although the names of the respondents did not appear on the face of the criminal proceedings, yet in fact they were the prosecutors; that they had

* *Present* : LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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"concocted and fabricated false evidence to get the appellant charged with rioting"; that there was no reasonable and probable cause for the prosecution; and that the respondents had acted maliciously. He accordingly made a decree in favour of the appellant, awarding him the sum of Rs. 6,082.8 as damages, and the costs of the suit.

The Court of the Judicial Commissioner reversed this decree and dismissed the suit. On the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (1) and *Dudhnath Kandu* v. *Mathura Prasad* (2), the judge with hesitancy decided that no one but a person who has made a formal complaint or application for process to a Court can be sued for damages for malicious prosecution. On the merits he said: "I am disposed to believe that the sub-inspector did institute a charge under s. 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the magistrate who tried the case; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved. The evidence of Bhagat Singh was anything but straightforward." He accordingly dismissed the suit, but without costs.

De Gruyther, *K.C.*, and *Kyffin*, for the appellant, contended that the Appellate Court was wrong in holding that an action for malicious prosecution will not lie against a person who has not instituted it and has not himself made a formal application for criminal process to a Court. The authorities relied upon, namely, *Dudhnath Kandu* v. *Mathura Prasad* (2) and *Narasinga Row* v. *Muthaya Pillai* (1), decided, no doubt, that no one but the actual prosecutor was liable, but they did not dispose of the question of fact as to who is the actual prosecutor in a manner applicable to all cases. That question, it was submitted, must depend upon what had been done by the defendants, whether they were the prime movers in and originators of the prosecution without whose action in the matter no prosecution would have been instituted. The First Court found that the defendants were the chief cause of the prosecution, that they had fabricated false evidence in support of it; and although their names did not appear

(1) (1902) I. L. R. 26 Madr. 362. (2) (1902) I. L. R. 24 Allah. 317.

on the face of the proceedings they gave false information to the police, instigated the charge, and took an active part in conducting it. Reference was made to *Fitz John* v. *Mackinder* (1), and to the Criminal Procedure Code (V. of 1898)—s. 147, as to disputes likely to cause a breach of the peace; s. 4, as to the definition of cognizable offence; s. 156, as to investigation by the police officer of a cognizable offence; Sched. II., offence under s. 147 of the Penal Code; s.190 *et seq.*, as to the conditions requisite for initiation of the proceedings; and s. 495, as to permission to conduct private prosecutions.

The respondents did not appear.

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July 31.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being manager of the Rampur Mathura estate, and the defendants being respectively munsarim and kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on November 22, 1902, but was not disposed of until July 15, 1903, when the magistrate dismissed it, holding that "there was no riot at all," and adding: "I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints."

The plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime"; and he gave the plaintiff a decree for Rs. 6,082.8 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narasinga Row* v. *Muthaya Pillai* (2), dismissed the suit, holding that "if the police

(1) (1861) 9 C. B. (N. S.) 505.

(2) I. L. R. 26 Madr. 362.

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or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual"; but he added: "I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the sub-inspector did institute a charge under s. 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the magistrate who tried the case; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (1) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms: "The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but, in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant

(1) I. L. R. 26 Madr. 362.

if he misleads the police by bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be, Who was the prosecutor ? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf on the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who pro hac vice represents the Crown. In India a private person may be allowed to conduct a prosecution under s. 495 of the Criminal Procedure Code, which provides that "any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police. . . . . Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shewn at any time in the course of the inquiry. As Bramwell B. observes in *Fitz John* v. *Mackinder* (1), "This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it." And in the same case Cockburn C.J. says (2): "A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a judge or magistrate, or, if spontaneously undertaken, from having been commenced under a bona fide belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the

(1) 9 C. B. (N. S.) 505, at p. 522. (2) Ibid at p. 531.

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prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres malo animo in the prosecution, with the intention of procuring per nefas a conviction of the accused."

Turning to the facts of the present case, it appears that on November 2, 1902, an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a sub-inspector of police, who says: "I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name. . . . . When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Parshad's name. How was it that the defendant had mentioned his name . . . . ? And then Bhagat Singh [said] that the chief cause of riot was the plaintiff; so he gave the plaintiff's name in the list, and that he would be summoned."

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and in the magistrate's Court; and the learned counsel who appeared for the prosecution at the trial before the magistrate expressly says that they instructed him that Gaya Parshad "joined the riot." As already mentioned, the magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to His Majesty in Council, the learned Judicial Commissioner says: "It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial under s. 170 of the Code of Criminal Procedure, or who conducts

the case against those persons when sent up for trial." And he adds: "All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, [we] think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The respondents must pay the costs of the appeal.

Solicitors for appellants: *Sanderson, Adkin, Lee & Eddis.*

MAHOMED ALI HAIDAR KHAN & ANOTHER. PLAINTIFFS;
AND
SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS . . . . . } DEFENDANTS.

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ON APPEAL FROM THE HIGH COURT IN BENGAL.

Regulation III. of 1891 (*Sylhet*)—*Jhum Rights—Construction.*

Regulation III. of 1891, issued under the authority of 33 Vict. c. 3, which provides for the commutation of jhum rights, cannot be applied unless it is shewn that at the permanent settlement those rights were exercised beyond the limits of the settled estate and at the same time included amongst the assets thereof. If exercised within the ambit of the settled estate they are not within the Regulation:—

Held, that the question whether the jhum lands in suit lay within or without the limits of the settled estate of the appellants was not a pure question of fact to be settled by concurrent findings below; that possession and enjoyment thereof as part of the settled estate for a length of time sufficient to afford evidence of title had been proved; and that consequently the regulation did not apply.

APPEAL from a decree of the High Court (March 29, 1904) affirming a decree of the Subordinate Judge of Sylhet (April 15, 1899).

* *Present*: LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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The plaintiff was one Mahomed Ali Amjad Khan, who died after the decree of the First Court, the appellants being his legal representatives. The respondent Secretary of State was one of the defendants.

In the exercise of powers vested in him by Regulation III. of 1891, which is sufficiently set out in their Lordships' judgment, the Chief Commissioner of Assam on July 25, 1891, notified that the Regulation would be put into force in certain areas from October 1 following. Among the tracts of land to which the notification related was the area in suit, which admittedly contained jhum lands. These lands are described in the judgment of the High Court as "lands in wild and jungly tracts on the Sylhet frontier, which were never brought under settlement by the Revenue authorities, but were left waste to be occupied by migratory cultivators who, after a time, abandoned them, and moved on to other similar lands with greater advantages. The proprietors of neighbouring estates seem to have taken rents, or forest dues, from these persons. Any rights so acquired, either by the cultivators, or by those who took rents or dues from them, were of a very indefinite and transitory character."

The plaintiff sued on April 13, 1897, for a declaration that the notification issued by the Chief Commissioner of Assam does not affect the plaintiff's right and possession of the lands in suit.

The relief was prayed for on two grounds—(1.) that the lands in suit (known locally as the lands of Puber Pahar, or Eastern Hill) were part and parcel of the permanently settled estates named in schedules 4 and 5 attached to the plaint, and not lands in which the plaintiff and his co-sharers had merely the jhum rights; (2.) that, by adverse possession for over sixty years, plaintiff had acquired a title against the Government. The plaint also stated that, under the permanent settlement, the settlement holders of those estates were given absolute proprietary right to the land described in schedule 1, and that the highest Revenue authority had decided that those lands appertained to the permanently settled estates.

In his written statement the Secretary of State for India in Council denied (1.) that the lands in suit were included in the taluqs, or estates, named by the plaintiff; and (2.) that the plaintiff

had acquired any title to the land by adverse possession. With reference to the other allegations made in the plaint, it was stated, in answer, that all that the highest Revenue authority admitted was that the plaintiff had jhum rights attached to the lands in dispute, but it was contended that, even if it were admitted that the plaintiff and his co-sharers really held such jhum rights, they had been extinguished by Regulation III. of 1891.

The Subordinate Judge dismissed the suit. With regard to Regulation III. of 1891 he observed that it was evident from the preamble that the Regulation did not apply to lands within the limits of the permanently settled estates, but applied to lands beyond the limits of those estates, upon which lands the proprietors of those estates carried on jhum or shifting cultivation, the income derived from such cultivation having formed part of the estimated assets, which formed the basis for assessment of revenue of the permanently settled estates. The first question, therefore, for determination was whether the land in dispute was within, or was beyond, the limits of the permanently settled estates.

After an examination of the documentary evidence in the record, he came to the conclusion that the land in dispute was beyond the limits of the permanently settled estates, and he therefore found that that land came within the operation of Regulation III. of 1891. He also held that, as the plaintiff had failed to shew that the disputed land was included in the permanently settled estates, it necessarily followed that it did not appertain to the taluqs, or estates, mentioned in schedules 4 and 5 attached to the plaint.

With regard to the title claimed by the plaintiff by adverse possession the Subordinate Judge said: "I now come to consider the nature of the jhum cultivation, and whether exercising this right the plaintiff acquired absolute ownership of the land. From the evidence it appears that jhum cultivation is carried on by hill tribes, such as Kukis and Tipperahs who reside in hill tracts. A number of such men take up their quarters in a part of the jungle, and cultivate the neighbouring lands. They burn and clear the jungle and grow their cotton and paddy and other

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crops. The peculiarity of this cultivation is that the same land does not yield a return without a long rest. After cultivating the land for a year or two and sometimes three years, the cultivators remove to a fresh spot and live and carry on their cultivation there. It does not appear that they have to obtain previous permission for doing the same. They select a piece of land at their will and carry on cultivation without any permission of the owner of the land; and then they are taxed at so much per head. When they come to meet the person to whom they pay the taxes, they make present of portion of their jhum produce. Such collections are rather in the nature of tolls or taxes than rents proper. The kabuliyats the cultivators executed were not for any specified piece of land, and for exercising tenant right over it, but only for carrying on jhum cultivation on a certain tract described therein.

"From the above it appears that the plaintiff and his predecessors had not the entire interest in the land; they enjoyed only a partial and casual interest. They had hardly any right over the land, their only right being to collect a certain tax from the people who carried on jhum cultivation apparently quite independently of them. As the entire interest in the land was not granted away, and as the plaintiff and his predecessors in interest only enjoyed the privilege of collecting taxes from the jhum cultivators, their right was not of an absolute and full owner, but was a mere privilege or easement.

"I may state here that in the case of kumri cultivation, which appears to be almost exactly of the same nature as jhum cultivation of Sylhet, the Bombay High Court has ruled it to be an easement. (1)

"On these grounds I find that the plaintiff and his predecessors in interest did not hold adverse possession of the disputed land for upwards of sixty years; and therefore they acquired no title by adverse possession."

The High Court affirmed this decree. The judgment referred to Regulation III. of 1891, and then observed that the main questions for consideration were whether, by the proceedings in the permanent settlement of the estates mentioned in

(1) *Bhaskarappa* v. *Collector of North Canara*, (1879) I. L. R. 3 Bomb. 452.

schedules 4 and 5 attached to the plaint, the lands in suit were included so as to form portions of those estates, or whether beyond the limits of those estates the assets merely were taken into account for purposes of assessment of Government revenue, but not so as to confer any title to the land; in other words, whether the lands, as such, came within the terms of the Regulation.

Upon these questions the judgment found that the plaintiff had failed to prove that the lands in suit lay within the boundaries of his permanently settled taluqs.

The material passage of the judgment as to the effect of the Regulation is as follows: "In making a settlement of an estate it is the duty of a revenue officer to ascertain the assets realized by the proprietor in the shape of rents, &c., from the lands forming portion of that estate and to assess the Government revenue on the result. It appears from the evidence before us, corroborated by the terms of the preamble of the Regulation, that when the permanent settlement of this part of the country was made, the income then derived from various rights was considered as an asset of the estate and taken into account in assessing the Government revenue. But it is equally clear that the rents paid for the occupation of lands cultivated as jhum, as well as such dues as were derived from cutting timber or otherwise which may roughly be described as forest rights, were variable, and it could not be said that any particular proprietor received such rents or dues on account of any particular tract of country for any considerable and continuous period of time. Even at the present time the evidence fails to shew this. The lands were waste and unoccupied, and had not been made liable to the payment of Government revenue, and, under the custom of the country, they were left open to the sparse uncivilized tribes who lived on the frontier to use them as they thought proper. Admittedly these people were never regularly settled on any particular lands. They cleared jungles and used the timber and the cultivated lands as they thought proper until they found that their labour could be more profitably directed to other lands, and they then abandoned their former holdings and occupied these new lands. Meanwhile the proprietors of lands under

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settlement with Government took advantage of their superior position and influence and took rents, and the dues realized by these persons from those occupying lands under the jhum custom were taken into account in assessing the Government revenue, and the Government abstained from attempting to make any regular settlement in regard to the payment of revenue on account of jhum lands. There is nothing to shew an admission by Government of any title to the large tract of waste lands still unoccupied save by casual acts of cultivation, cutting timber, and so forth. How far the inclusion of such assets would give any title to the lands for which rents were then paid is another question. But if the lands were beyond the limits of the estates under permanent settlement, it is clear that they come within the Regulation, for it is to such lands that the Regulation is expressly directed. This is shewn by the preamble. All rights over such lands were declared to be extinguished, compensation being given for their loss, and it was further declared that no claim on the ground of such rights shall be entertained in any suit or proceeding."

Sir R. Finlay, K.C., and *De Gruyther, K.C.*, for the appellants, contended that the lands in suit were part of their permanently settled estate, and that, therefore, Sylhet Regulation III. of 1891 did not apply. The land in dispute is known as mouzah Puber Pahar. The records of the decennial settlement afterwards made permanent were not forthcoming, but the mouzawari papers for 1801-2 shew that the income derived from it was included in the collections from the entire estate. Those papers in later years shew that jhum is not cultivated in one place every year. The word "jhum" means a hill or forest village, in which cultivation would be shifting. There is nothing in the word itself or in its use to indicate that the hill or forest village cannot form part of a permanently settled estate. The evidence shewed that the land in suit was assessed to revenue as part of the appellants' estate, and that from the date of the settlement the appellants, or those from whom they derive title, held continuous possession, received the rents, and paid the revenue originally assessed thereon. Bengal Regulations I. of 1793,

s. 10, and VIII. of 1793, ss. 35-39, shew that only assets arising out of the estate itself could be taken into account in settling the revenue of an estate. The fact that the income from the jhum lands in suit was so taken into account is cogent evidence that those lands formed part of the settled estate. Reference was also made to the mouzawari papers of 1882-3, and of 1829-30; Field's Regulations, ed. 1875, Introduction, p. 41, as to the meaning of " mahal " as an estate in land separately assessed to Government revenue; Assam Land Revenue manual, by Gait, ed. 1896 (Sylhet province), pp. cxxviii., cxxix., cxxxii., cxxxiii.,cxxxviii.; the 5th Report of the Select Committee on the Affairs of the East India Company, Madras, ed. 1883; vol. 1, pp. 14, 18, 21, 23-130, 139, 146, 147, 150, 568, 571, 580, 585, 592, 609, 611, 613, 616, 630. The onus lay on the Secretary of State to shew that Regulation III. of 1891 was applicable; and it was submitted that he had failed to do so, and that the evidence shewed that the lands were part of the permanently settled estate, or at least that the appellants had shewn that any defect in their title had been cured by adverse possession for a sufficient period of time to afford evidence of title.

Cohen, K.C., and *Ross*, for the respondent Secretary of State, contended that on the evidence the appellants had failed to shew that the lands in suit had been included in their permanently settled estate. The concurrent findings of the Court below were conclusive upon that point. It was contended that the documentary evidence, taken as a whole, clearly shewed that the officers who effected the permanent settlement in question included for the purposes of assessment the income under the name of jhum then derived by the proprietors of the estate so settled from shifting cultivation carried on by the proprietors or their dependants beyond its limits. Further, it was shewn that the areas of such cultivation were necessarily undefined and varied from year to year. The lands so undefined could not be, and were not, included in the settled area; and this state of things is exactly what the Legislature contemplated when it passed Regulation III. of 1891. Although the income from the lands was included as assets accruing to the owner in respect of which he was assessable, yet it was clearly understood that the

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income was derived, not from lands which formed part of the settlement, but from lands which lay wholly outside it. The preamble and ss. 2 and 3 of Regulation III. of 1891 were referred to, and the Assam District Gazetteer, "Sylhet," vol. 2, p. 262. The appellants, moreover, had failed to prove that they had the entire interest in the lands in suit. The evidence shewed merely a casual and partial interest, insufficient as evidence of title or of adverse possession.

De Gruyther, K.C., replied.

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July 31.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against a judgment and decree of the High Court of Calcutta, dated March 29, 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet, dated April 15, 1899.

The question raised upon the appeal is whether Regulation III. of 1891, issued under the authority of the Act 33 Vict. c. 3, can properly be applied in the case of certain lands known by the name of Puber Pahar.

The Regulation in question begins with a most useful preamble which recites as follows :—

"Whereas the officers who effected the permanent settlements of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of those estates, under the designation of jhum . . . . . the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates . . . .

"And whereas, inasmuch as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest-produce shifted from year to year over immense and altogether undefined areas, the tracts of land over which they extended were not specified at the time of the settlement, and, in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas ;

"And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is, in consequence, impeded;

"And whereas it is expedient that the rights, if any, corresponding to the said jhum . . . . assets should be commuted."

Sect. 2 enacts that "All rights . . . . in respect of which jhum . . . . assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of or under cover of such assessment shall be deemed to have been extinguished." And s. 3 declares that all proprietors of such estates shall be entitled to compensation.

The nature of jhum cultivation is explained in an early official document relating to the hill lands in question: "The dastur of jhum cultivation is this: jhum is not cultivated in one place every year. When land is found anywhere within these boundaries jhum cultivation is made thereon, and after measurement and assessment the mirasdars take the rest by apportionment according to their respective shares in the jhum revenue at the time of the hastbud (1) measurement." And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam, whose jurisdiction included Sylhet, issued and published orders in due course extending the Regulation to the areas in question, with others.

The question, therefore, raised in the case and discussed on this appeal is whether the Regulation can be put in force with reference to the lands to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances of the case) of the appellants' predecessors in title. The Government claims to apply to these lands a regulation which would have the effect of confiscating proprietary rights and giving compensation in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to shew that the facts of the case are such as to bring it within the operation of the Regulation—in other words, that the present case is one in which, at the permanent settlement,

(1) Corruptly so written for "hast-o-bud," see Wilson's Glossary.

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in making settlement of certain taluqs with the appellants' predecessors in title, the officers of Government included, for the purposes of assessment, among the assets of those taluqs the income derived by their owners from jhum cultivation carried on beyond the limits of the settled estate.

That the taluqs now held by the appellants were settled at the permanent settlement is beyond dispute, and that in estimating the assets of those taluqs the profits of the present jhum lands were then brought into account is also beyond dispute. But according to the appellants those profits were taken into account because the jhum lands formed part of the settled estate; while, according to the other side, the jhum land profits were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question whether the jhum lands lay within or without the limits of the settled estates was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense the question is one of fact; but at every point in the process of the reasoning considerations of law have to be regarded. It was contended on the other side that under the regulations in force at the time of the permanent settlement no assets could lawfully be taken into account in settling the jumma of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption that in any individual case the course in accordance with law had been followed. But this contention was met, and in their Lordships' opinion effectively met, by a reference to the preamble of the Regulation under consideration. That preamble shews that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The taluqs in which the lands in question are said to have been included were, no doubt, settled at the decennial settlement,

and that settlement was in due course made permanent. But, as might be expected after so great a lapse of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain mouzawari papers from 1801-2 onwards. These shew clearly that, in assessing the taluqs, the jhum assets were taken into account. But this, as has been shewn, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

Those papers were examined in detail by counsel upon both sides on the argument of the appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favourable to one side and circumstances favourable to the other, but that no confident conclusion could be drawn from these papers either one way or the other.

Reliance was also placed upon certain thakbast maps, but these are equally inconclusive.

The only other matter which remains to be considered is the evidence as to possession and enjoyment of the lands in question on the part of the plaintiff and those who preceded him. In the Courts in India the plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and on the argument of the appeal no such case was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important, and it all points one way. It was shewn that from as early as 1837 the appellants' predecessors in title received kabulyats from persons carrying on jhum cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining mouza.

On several occasions in subsequent years the appellants' predecessors successfully resisted proposals on the part of revenue officers of Government to settle portions of these hill lands as ilam lands open for settlement. The most important instance was one that terminated in an order passed by the Board of

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Revenue (the highest Revenue authority in the province) dated September 14, 1855. It had been proposed to offer for settlement a portion of the lands now in suit as ilam lands. This was objected to by the appellants' predecessors. The Collector overruled the objection, but the Board of Revenue, concurring with the Commissioner, reversed that finding, and on the ground, as their Lordships understand it, that the lands were included in the permanent settlement. After that the possession and enjoyment of the appellants and those through whom they claim seem to have been continuous.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decrees of the Courts in India should be set aside with costs, and a decree made granting the appellants the declaration asked for by the plaint. The respondent the Secretary of State will pay the costs of this appeal.

Solicitors for appellants : *T. L. Wilson & Co.*
Solicitor for respondent : *The Solicitor, India Office.*

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June 17 ; *July* 16.

ATAR SINGH AND OTHERS . . . . . DEFENDANTS;

AND

THAKAR SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Hindu Law—Ancestral Estate — Suit by Minors to set aside a Father's Alienation.

In a suit by Hindu minors to set aside their father's deed of sale of the lands in suit to the defendants on the ground that they were ancestral :—

Held that, as the plaintiffs claimed through their father as son and heir of D., the onus was on them to shew that the lands were not self-acquired by D., and as that onus was not discharged the lands must be deemed to be the self-acquired property of D., and the deed could not be set aside.

APPEAL from a decree of the Chief Court (May 26, 1903) reversing a decree of the Court of the District Judge of Amritsar (March 30, 1899).

* *Present*: LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

On May 7, 1894, Dyal Singh, the father of the plaintiffs in the suit (of whom the respondent is the survivor), executed a deed of sale conveying a thirty-seven-sixty-fourth share of the properties in suit to the appellants and certain other members of their family in consideration of advances made and services recited to have been rendered. These properties at one time belonged to Sardar Dhanna Singh, at whose death they passed to his widows, Dyal Singh being his nearest reversionary heir on their deaths, which happened prior to 1894. The suit was brought in 1897 on behalf of the minor sons of Dyal Singh, namely, Thakar Singh and Kehr Singh. The latter died pendente lite. The plaint alleged that the sale of 1894 was without legal necessity, and that the property in suit was ancestral property and incapable of being alienated by Dyal Singh, who was made a party defendant, except for necessity. The prayer was that the sale be declared not binding on the reversionary interests of the plaintiffs.

The vendees pleaded, so far as now material, that the property in suit was not ancestral, that Dyal Singh had full power of alienation, and that the alienation was for necessity. Both Courts held, with regard to properties in suit other than the land and house in Tungbala, that they were not ancestral, and that accordingly Dyal Singh's alienation bound the respondent. With regard to the Tungbala estate the Courts differed, the District Judge finding that it was not ancestral, the Chief Court that it was. The material passages in the judgment of the Chief Court are as follows :—

"We proceed at once to what is the main point in the case and what has been the crucial point throughout, i.e., is the property in suit 'ancestral' in whole or in part in the sense in which that term is understood under the customary law? 'Ancestral property' for the purposes of this suit means property which was held by an ancestor who is the common ancestor of the parties. In this case, therefore, it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh.

"There appears to be no doubt that the village was originally founded by a Tung Jat who was the common ancestor of the defendants, Dyal Singh and Dhanna Singh. In the pedigree

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table prepared at settlement Dyal Singh and Dhanna Singh are shewn as descended from one Harji. No doubt in the Sikh times the stronger members of a family got more than their shares, and we find from the remarks recorded in 1892-93 that the entire land had practically come into the hands of Dhanna Singh. Lands given up by other co-sharers and coming to Dhanna Singh in virtue of his relationship and of the fact that the land had been held by a common ancestor of the absconder and Dhanna Singh would clearly be held to be ancestral. Some portions may have been derived from other proprietors of their holdings only by purchase or simple acquisition in their absence, but the main portions would appear to have been left by the other Tung relatives to come into Dhanna Singh's hands. It is noted in the pedigree table that 'Most of the co-sharers of the village, being in straightened circumstances, absconded or absented themselves. Out of the proprietary body Sardar Dhanna Singh alone remained in possession of the entire land.' It would appear, therefore, clear that the village had been acquired practically in its entirety by Dhanna Singh in consequence of the abandonment of his relatives and collaterals. In regard to such land it has been laid down in Punjab Record No. 31 of 1894 that it should be considered ancestral. At page 88 of that judgment it is remarked, 'Considering that this was a portion of the family ancestral holding, and fell to Sham Singh owing to its abandonment by a near relative, we think that this portion of the estate should be held to be governed as regards alienations by the same rule as that which applies to that part of the estate which is admittedly ancestral.' We think that this particular land is not removed from the category of ancestral property merely because it came to Sham Singh owing to the abandonment thereof by a near relative rather than by simple inheritance. These principles are in no way traversed in the judgment in Punjab Record No. 81 of 1901, which is by a single judge, the circumstances in that case being quite different from those in this. We think, therefore, that it must be presumed that the land in Dhanna Singh's hands before the village was evacuated in order that Kanwar Nau Nihal Singh might make a garden of it must be considered to have been then ancestral. It is impossible to differentiate between the

portions which came from relatives and co-sharers and the portions which may have, in some instances, been purchased.

"It appears, however, that Kanwar Nau Nihal Singh 'about fifty years ago (i.e., about 1842) caused the village to be evacuated, for he intended planting a garden there.' These are the words on this point in the pedigree table of 1892-93. It does not appear how far this intention was ever carried out, or whether the depopulation and evacuation went beyond the village site. It appears that when Sardar Nau Nihal Singh wished to start his garden Sardar Dhanna Singh started another village site—abadi—on the lands of the hunting ground known as Shikargah, and that abadi remained as the village site of Tungbala, the old site, which had been destroyed or depopulated to make room for the garden being included as nazul property in Amritsar. It does not appear whether Sardar Nau Nihal Singh ever intended to, or ever did, take up the cultivated lands of Tungbala, which would have made a very large garden. The word used in connection with the garden is tamir, which suggests the idea that a walled and enclosed garden was intended. The idea was not carried out, but the new abadi for Tungbala which Dhanna Singh had started remained as the abadi of Tungbala and the old one was incorporated in Amritsar. It does not appear whether or not Dhanna Singh was ever dispossessed of any part of the culturable lands; if he was, apparently they were almost immediately restored intact. Some neighbouring villages were destroyed to make the hunting ground of Maharaja Kharak Singh, but this was not the case with Tungbala, and we are quite unable to find from the record that there was any such confiscation and break of ownership in regard to Tungbala as would bring the case within the purview of the ruling in *Ram Nundun Singh* v. *Janki Koer*. (1) Even if the land was taken up by Sardar Nau Nihal Singh for a short period, which is by no means established, it appears to have been restored intact, and there was no such break of continuity as to deprive the property of its ancestral character. We hold, therefore, on a full consideration of all the facts disclosed by the record, that that part of the property must be classed as ancestral."

(1) (1902) L. R. 29 Ind. Ap. 178; S. C. I. L. R. 29 Calc. 828.

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De Gruyther, K.C., for the appellants, contended that the plaintiffs were bound by their father's deed of alienation unless they proved (and the onus lay on them) that the property now in suit was the ancestral and not self-acquired property of their father. Their father was the heir of Dhanna Singh, to whom the property belonged at his death. But in order to prove that the land was ancestral in the hands of their father they must shew that they came to Dhanna Singh by descent from a lineal male ancestor in the male line through whom the plaintiffs also in like manner claimed. Otherwise it did not descend upon Dhanna Singh in such a manner that the plaintiffs as his issue acquired right in it as against him. There was no evidence to identify this property as included in properties which had come to Dhanna Singh by lineal male descent as an unobstructed inheritance. The boundaries of the self-acquired and ancestral properties, if any, were not defined by the evidence, and therefore it was impossible to prove that the property in suit was ancestral. Conjectures, however reasonable, could not supply the place of conclusive evidence. Reference was made to Mayne's Hindu Law, 7th ed. p. 343, s. 275 ; *Sona* v. *Loku* (1) ; and see also *Ram Nundun Singh* v. *Janki Koer*. (2)

The respondent did not appear.

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July 16.

The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal from a decree of the Chief Court of the Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakar Singh and his brother Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on May 7, 1894, by their father, Dyal Singh, to the appellants and certain other persons as purchasers, on the ground that the lands the subject-matter of the sale were, in the view of the Hindu law, ancestral, and that the sale was not necessary and was for a fictitious consideration and in fraud of the rights of the plaintiffs' father, Dyal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. Kehr Singh died while the suit was

(1) (1881) Punjab Record, vol. 16, p. 2. (2) L. R. 29 Ind. Ap. 178.

pending. The only question in dispute on this appeal is whether the lands were ancestral. The District Judge has held that they were not; the Chief Court has reversed his decision and held that they were.

It is not disputed that the onus on this issue is on the plaintiffs, and it is because in the opinion of the District Judge they failed to discharge this onus that the suit was dismissed.

It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law. Therefore, if the plaintiffs cannot shew that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the district by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons who may have been collateral, and in that way may have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land respectively. Indeed the learned judges of the Chief Court themselves say, "It is impossible to differentiate between the portions which came from relatives and co-sharers and the portions which may have, in some instances, been purchased." But it is by reason of this impossibility that the plaintiffs failed to prove their case. The learned District Judge also points out that since the death of Dhanna Singh large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively self-acquired lands. Their Lordships agree that, when the onus lies, as it does in this case, on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the judges of the Chief Court, their Lordships venture

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to think that they have hardly given sufficient weight to this consideration. Their Lordships agree with the conclusion and reasoning of the learned District Judge, and will humbly advise His Majesty that the appeal be allowed and the decree of the Chief Court set aside with costs. The respondent must pay the costs of this appeal, except so far as they may have been increased by the delay which has taken place in the prosecution of the appeal.

Solicitors for appellants: *Watkins & Lempriere.*

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